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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may exercise diversity jurisdiction, without requiring an exhaustion of tribal remedies, over a commercial breach of contract action brought against an on-reservation corporation wholly owned by an Indian tribe where the dispute implicates tribal sovereignty.

2. Whether a tribal waiver of sovereign immunity with respect to a written contract can be impliedly extended to a claim brought by a stranger to that contract.

3. Whether a Letter of Intent agreement between a governmental subdivision of an Indian tribe and a non-Indian to establish and operate a manufacturing operation on tribal land is an agreement for services "relative to" tribal land within the meaning of 25 U.S.C. § 81.

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PETITION FOR WRIT OF CERTIORARI

Sioux Manufacturing Corporation[1] ("Sioux Manufacturing") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The unpublished opinions of the United States District Court for the Northern District of Illinois are reproduced at pages 22-42 of Petitioner's Appendix ("Pet. App."). The

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[1] Sioux Manufacturing Corporation has no parent companies or subsidiaries, but is wholly owned by the Devils Lake Sioux Indian Tribe.

opinion of the United States Court of Appeals for the Seventh Circuit is reported at 983 F.2d 803 and is reproduced at pages 1-21 of Pet. App.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 8, 1993. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 27, 1993. Thereafter, on July 7, 1993 and again on August 3, 1993, Justice Stevens signed orders extending the time for filing this petition for certiorari to and including September 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND OTHER LAWS INVOLVED

This case concerns the use of federal diversity jurisdiction under 28 U.S.C. § 1332 (1988) to impair Indian tribal sovereignty. Pet. App. 47.

This case also concerns provisions of the Devils Lake Sioux Tribal Law and Order Code ("Tribal Code") which are set forth at pages 49-52 of Pet. App.

The case also concerns the protective provisions of 25 U.S.C. § 81 (1988), which are set forth at Pet. App. 45-46.

STATEMENT OF THE CASE

A. NATURE OF THE CONTROVERSY

This is a diversity suit in which a law firm employed by a third party seeks recovery of its legal fees, in the first instance in the federal court, from an on-reservation corporation wholly owned by an Indian tribe. Jurisdiction

of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a partnership of citizens of the states of Illinois and Indiana, and the defendant, a corporation, deemed a citizen of the state of North Dakota.

Sioux Manufacturing was created by the Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe. The corporation was organized under the Tribe's law and order code as a governmental subdivision of the Tribe. Its offices and sole facility are located on the Devils Lake Sioux Indian Reservation ("Reservation") on tribal trust land.

The Reservation is located entirely within the state of North Dakota and was established by treaty. *See* Treaty between the United States of America and the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, Feb. 19, 1867, 15 Stat. 505. The Tribe has enacted an extensive law and order code and has established a tribal court system, which includes both a trial and appellate court with civil and criminal jurisdiction.

On March 7, 1990, John Veleris, acting on behalf of Medical Supplies and Technology, Inc. ("MST"), an Illinois corporation, and Robert Manning, acting on behalf of Sioux Manufacturing, signed a Letter of Intent agreement. That agreement, set forth on pages 56-67 of Pet. App., provided for the establishment, construction, development, and operation of a manufacturing facility on the Tribe's trust land within the Reservation to reduce tribal unemployment.

The Letter of Intent, among other things, provided that MST would provide and sell the "architectural and engineering drawings and specifications for the building in which the Products [would] be produced" and "waste and

environmental plans" for the development and operation of the facility on reservation land. Pet. App. 56-57. The agreement also set forth the parties intention that MST would have an "exclusive" contract to provide "consulting services . . . for the management and operation of the Business." *Id.* at 58, 62.

The Letter of Intent outlined a plan of multiple payments to MST. Included were payments for start-up expenses, consulting services and the purchases of MST's assets. *Id.* at 57-60. In addition, MST would receive a significant percentage of the net profits off the top and a percentage of all gross sales regardless of whether the venture was profitable. *Id.* at 60-61.

Further, the Letter of Intent contained a clause whereby if the transactions contemplated were not consummated within 60 days of the date of the agreement, Sioux Manufacturing would pay MST for its reasonable legal fees. *Id.* at 64-65.

After the Letter of Intent was signed, MST began business operations on tribal trust lands utilizing Sioux Manufacturing facilities and MST was paid over $150,000 by Sioux Manufacturing. The parties also entered into subsequent agreements modifying the Letter of Intent. However, the deal was never consummated and the manufacturing business was never established. On November 1, 1990 MST ceased operations within the Reservation.

B. THE PROCEEDINGS BELOW

In May of 1991 MST sued Sioux Manufacturing in Illinois State Court for breach of contract seeking seven million dollars in damages, claiming Sioux Manufacturing wrongfully failed to establish the manufacturing operation on the Reservation. In June of 1991, Altheimer and Gray

("Altheimer"), a Chicago-based law firm which provided MST with legal services in connection with the Letter of Intent, filed a diversity suit against Sioux Manufacturing in Federal District Court for the Northern District of Illinois. Altheimer contended under Illinois law that it was a third-party beneficiary to the Letter of Intent and sought payment directly from Sioux Manufacturing for legal services provided to MST.

Sioux Manufacturing removed MST's action to the federal court and the two cases were consolidated. Sioux Manufacturing then filed a motion seeking a dismissal of both cases on various grounds, including: the plaintiffs were required to exhaust tribal remedies before the federal court could proceed with the cases; the suits against Sioux Manufacturing were barred on the basis of sovereign immunity; and the breach of contract actions were barred because the underlying contract was void for lack of compliance with the protectionist requirements of 25 U.S.C. § 81.

The district court declined to stay the federal court actions pending exhaustion of tribal remedies, but did grant summary judgment in favor of Sioux Manufacturing in both suits. The district court concluded that the breach of contract claims could not be sustained, as the Letter of Intent was void under 25 U.S.C. § 81. This statute was enacted to protect Indian tribes. The statute provides that an agreement "made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands" will be null and void unless the parties comply with the six listed requirements as to form and manner of execution of the agreement. 25 U.S.C. § 81, Pet. App. 45. One of the requirements is that the

agreement be approved by the Secretary of the Interior. *Id.* The district court found that the Letter of Intent "was inextricably rooted in a planned transaction regarding Indian land" and therefore was null and void for lack of the required approval. Pet. App. 40.[2]

Altheimer appealed, but MST did not. In its reversal of the district court's decision, the Seventh Circuit first addressed the merits of the contractual voidness question. Disregarding the plain language of section 81, which broadly protects Indian tribes in agreements for "services . . . relative to [Indian] lands", the appellate court restricted the statute's application to "protect[ing] Indian tribes in land transactions" which "cede any right, interest or control of Indian lands." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 805, 812 (7th Cir. 1993), Pet. App. 1, 14.

Next, in considering the question of tribal sovereign immunity, the appellate court interpreted and applied various tribal ordinances, as well as reviewed the actions of individuals acting for Sioux Manufacturing, and concluded that Sioux Manufacturing's sovereign immunity had been waived. *Id.* at 812, Pet. App. 16.

Lastly, the Seventh Circuit addressed the tribal exhaustion doctrine. The appellate court concluded that an exhaustion of tribal remedies was not required, because Sioux Manufacturing had agreed in the Letter of Intent to submit to the venue and jurisdiction of the federal courts in Illinois. *Id.* at 815, Pet. App. 20-21.

The Seventh Circuit, on Sioux Manufacturing's motion, has recalled and stayed its mandate pending the disposition of this petition.

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[2] The district court did not address the sovereign immunity issue.

REASONS FOR GRANTING THE WRIT

This case presents important and frequently recurring questions regarding the role of federal diversity courts in adjudicating commercial contract disputes affecting the interests of Indians on reservation lands.

I.

THE SEVENTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE EIGHTH AND NINTH CIRCUITS.

A. This Court's Decisions In *National Farmers Union* And *Iowa Mutual* Require The Local Tribal Court, In The First Instance, To Determine The Issues Of This Case.

This Court has historically required the federal courts to respect tribal autonomy and self-government when exercising their adjudicatory jurisdiction. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883). In recent years, following Congress' clearly delineated policy of "encouraging tribal self-government," the Court has imposed a procedural bar to the exercise of civil adjudicatory jurisdiction by a federal diversity court over commercial matters relating to reservation affairs. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). The Court has required exhaustion of tribal remedies and directed that such disputes must be litigated in the first instance in the local tribal court and not in the federal courts. *Id.*; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

The Seventh Circuit, however, trespasses on the realm of tribal autonomy and self-government, which has been so carefully respected by this Court and other federal appellate courts, by redefining the boundaries between the

civil courts of the federal government and Indian tribes. It accomplishes this by re-characterizing the doctrine of exhaustion of tribal remedies from a bright line "inflexible bar to [the] consideration of the merits" of a dispute, *Granberry v. Greer*, 481 U.S. 129, 131 & n.4 (1987), to a flexible discretionary principle. Exercise of that discretion, the Seventh Circuit holds, would turn on a federal court's interpretation and application of tribal law,[3] review of the actions of tribal officials in Indian country and ultimately a determination of what is in the tribe's best interests. 983 F.2d at 814-15, Pet. App. 18-21.

The appellate court's flawed analysis is best exemplified by the court's approach to the question of whether an official of Sioux Manufacturing has the power to and, if so, actually did waive the Tribe's adjudicatory authority over an action brought by Altheimer. Tribal law permits only the Tribe's elected governing body, the Tribal Council, to waive the requirement of exhaustion of tribal remedies. Tribal Code § 2-2-104, Pet. App. 50. Further, any such waiver must be expressly limited as to grantee. *Id.* The Seventh Circuit ignores these restrictions and proceeds to find a waiver of the Tribe's sovereign adjudicatory authority through the actions of an official of Sioux Manufacturing. The underlying basis for this finding was the federal court's belief that "the Tribe's efforts to improve the reservation's economy may come to naught" if the actions of an official of Sioux Manufacturing are not

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[3] This case involves a number of significant issues which require interpretation of tribal law. For example, one issue is whether the Tribe has waived the requirement of exhaustion of tribal remedies. *See* Tribal Code § 2-2-104, Pet. App. 50. Also at issue is the question of whether Sioux Manufacturing's sovereign immunity has been waived to permit a claim against it by Altheimer. *See* Part II of this petition, *infra*.

imputed to the Tribe. 983 F.2d at 815, Pet. App. 21. Further, the court made Altheimer the grantee of the purported waiver even though Altheimer was not expressly identified as such in the Letter of Intent. Such reasoning is clearly contrary to Tribal law and undermines both federal policy and clear historical precedent of this Court which promotes direct, independent and exclusive authority of tribal courts over civil disputes arising out of reservation affairs. *Iowa Mutual*, 480 U.S. at 18; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978); *Williams v. Lee*, 358 U.S. 217, 223 (1959). *See also Talton v. Mayes*, 163 U.S. 376, 385 (1896) (interpretation and application of tribal law are "solely" matters within the jurisdiction of the tribal court).

The obvious premise for the Seventh Circuit's decision is a flawed paternalistic theory that federal diversity courts are equally and in certain circumstances better qualified than tribal courts to adjudicate commercial contract disputes affecting the interests of Indians on tribal reservation land. Such reasoning impedes both of the imperatives which the exhaustion doctrine is intended to promote. First, it impedes the imperative of avoiding federal court infringement "upon tribal lawmaking authority." *Iowa Mutual*, 480 U.S. at 16. If tribal self-government means anything, it certainly must include tribal court review of tribal law affecting the waiver of governmental rights and immunities by individuals. Due to the influence of Indian traditions and customs, tribal court interpretations may differ from interpretations rendered by a non-Indian court. *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978).

Secondly, the appellate court's reasoning impedes the imperative of avoiding placement of the federal court "in direct competition with the tribal courts, thereby impair-

ing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16. As the Seventh Circuit acknowledges, the present dispute implicates an Indian tribe's self-government and self-determination interests, including the tribe's efforts to improve its reservation economy. 983 F.2d at 815, Pet. App. 20-21. Civil jurisdiction over such an action "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. There is, however, no indication that Congress intended the diversity statute to permit a federal court to interject itself into matters of tribal self-government and self-determination in adjudicating, in the first instance, a commercial dispute. *See Iowa Mutual*, 480 U.S. at 18.

Accordingly, the Seventh Circuit's opinion is not only inconsistent with the decisions of this Court, but it is also clearly an improper encroachment upon the self-governing rights of Indian tribes to make and enforce their own laws and an impediment to the growth and development of tribal courts.

B. Certiorari Should Be Granted To Resolve Conflicts Between The Court Of Appeals For The Seventh Circuit And The Courts Of Appeals For The Eighth And Ninth Circuits.

The Seventh Circuit in this case, without requiring an exhaustion of tribal remedies, erroneously elects to interpret and apply tribal law to resolve questions surrounding the validity and scope of purported waivers of tribal sovereign rights and immunities. 983 F.2d at 812-15, Pet. App. 15-21. This holding conflicts with the decisions of the Courts of Appeals for both the Ninth and Eighth Circuits. The Ninth Circuit, in an *en banc* opinion, held that

because issues surrounding a claim of tribal sovereign immunity would "require a careful study of the application of tribal laws and tribal court decisions," a federal diversity court should stay its hand until after the tribal court has an "opportunity to resolve the question." *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992). The Eighth Circuit Court of Appeals has reached the same conclusion, holding that a federal diversity court should not address the question of tribal sovereign immunity until after the federal court resolves the issue of whether an exhaustion of tribal remedies is necessary. *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1277 n.3 (8th Cir. 1987). If exhaustion is required, the federal court should decline to reach the sovereign immunity issue. *Id.*

The Seventh Circuit's approach conflicts with both the Eighth and Ninth Circuits, because the Seventh Circuit advocates addressing and resolving the sovereign immunity issue prior to considering the exhaustion issue. Furthermore, the Seventh Circuit does not require exhaustion even where resolution of that issue and the issue of sovereign immunity will require interpretation and application of tribal law.

The Seventh Circuit also addresses and resolves the merits of the contractual voidness issue under 25 U.S.C. § 81 before addressing the question of whether exhaustion of tribal remedies is necessary. 983 F.2d at 808-812, Pet. App. 7-15. This aspect of the Seventh Circuit's decision conflicts with the Ninth Circuit's decision in *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992). There the Ninth Circuit held that where federal law does not give the federal court exclusive jurisdiction, the principle of judicial self-restraint regarding activities occurring inside the reservation is so strong that the federal court

should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law. *Id.* Likewise here, federal law does not sanction the Seventh Circuit's approach in resolving the merits of the voidness issue under section 81 and utilizing that decision as a means to avoid the necessity of exhaustion.[4]

For these reasons, the decision of the Seventh Circuit is in conflict with the decisions of the Eighth and Ninth Circuits and the writ of certiorari should be granted.

II.

THE DECISION BELOW ERRONEOUSLY APPLIES TRIBAL AND FEDERAL LAW TO STRIP AWAY TRIBAL SOVEREIGN IMMUNITY BY IMPLICATION.

The Seventh Circuit, in section B of its opinion, erroneously interprets and applies tribal law and the decisions of this Court dealing with the doctrine of sovereign immunity. The Seventh Circuit extends a limited waiver of tribal sovereign immunity "with respect to any written contract entered into by the Corporation" to include not only claims brought by a contracting party, but also claims brought by a stranger to the contract. Articles of Incorporation of Sioux Manufacturing Corporation § 4.2.2, Pet. App. 53.[5]

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[4] *See also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 n.16 (9th Cir. 1989) (an argument based on a contractual waiver of the exhaustion doctrine is "weak" where the validity of the waiver clause is in dispute under 25 U.S.C. § 81).

[5] A related issue which arises in a different factual scenario is before the Court in the Petition for Certiorari filed in the case of *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3621 (U.S. Feb. 23, 1993) (No. 92-1398). One

(Footnote continued on following page)

As a matter of both tribal and federal law, while sovereign immunity may be waived by a tribe itself, the general rule remains that such a waiver must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52. Courts are not free to extend a waiver beyond that which the sovereign intended. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). Further, individual officials have no power to waive conditions or limitations imposed by law with respect to suits against an immune entity. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 513 (1940); Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52.

The Seventh Circuit, while not expressly stating why, assumes that a waiver of immunity for Altheimer's claim could be implied by using third party beneficiary principles. The court is in error. First, third party beneficiary principles do not comport with tribal law. Waivers of sovereign immunity are disfavored and tribal law requires that the grantee of such a waiver be expressly identified. Tribal Code § 2-2-103, Pet. App. 49-50. Altheimer is not a party to the Letter of Intent nor are they expressly identified as an intended beneficiary of any waiver of sovereign immunity. Significantly, Congress also expresses its concerns along this same line in its protective statutes covering contracts with Indian tribes and requires that parties in interest be expressly identified. *See* 25 U.S.C. § 81.

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[5] *continued*
of the questions presented for the Court's consideration is whether common law immunity of an Indian tribe under federal law extends to a tribal governmental entity engaged in commercial activity off the reservation.

Secondly, third-party beneficiary law principles derived from state law can not be used to imply a waiver of immunity for claims brought against Indian tribes. The "morass" of third-party beneficiary principles is "plagued by uncertainties, doctrinal and conceptual difficulties, and confusion." *Ables v. United States*, 2 Cl. Ct. 494, 499 (1983), *aff'd*, 732 F.2d 166 (Fed. Cir. 1984) (table). Those principles simply can not provide the necessary unequivocal expression of intent to grant Altheimer a waiver of Sioux Manufacturing's sovereign immunity. As the Ninth Circuit notes in *Pan American Co. v. Sycuan Band of Mission Indians*, "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." 884 F.2d 416, 419 (9th Cir. 1989), *citing USF & G*, 309 U.S. at 513.

Accordingly, the decision below is in conflict with the decisions of this Court and tribal and federal law and review by this Court is respectfully requested.

III.

THE DECISION BELOW VIOLATES 25 U.S.C. § 81.

From the first days of this nation, the Federal Government has sought to respect the sovereignty of Indian tribes, including protecting tribal property. Such federal policy has been necessary for the survival of the Indian tribes and their way of life. Felix S. Cohen, *Handbook of Federal Indian Law* 509 (1982 ed.). Primary among these protections are the requirements embodied in 25 U.S.C. § 81.[6] Those requirements govern the form and

[6] *See also* 25 U.S.C. § 177 (1988) (prohibiting land transactions with Indian tribes); 25 U.S.C. §§ 261-264 (1988) (regulation of trade in Indian Country).

manner of execution of tribal contracts. The Seventh Circuit's decision, however, enables the Letter of Intent agreement and other agreements to circumvent the protections provided by section 81.

A. The Seventh Circuit Distorts The Plain Language Of Section 81.

The language of section 81 is straightforward:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . or for the granting or procuring any privilege to him, or any other person in consideration of *services for said Indians relative to their lands* . . . unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior. . . .
>
> . . . .
>
> All contracts or agreements made in violation of this section shall be null and void. . . .

25 U.S.C. § 81, Pet. App. 45-46 (emphasis added). The crucial inquiry, here, is whether the Letter of Intent calls for "services" to be provided "relative to" the Tribe's land.

However, the Seventh Circuit's characterization of section 81 and its analysis of the statute's application makes clear that the appellate court is disregarding the literal or usual meaning of the words of the statute. The Court begins its opinion with the following characterization of section 81: "This case deals with the modern application of a 19th century federal statute designed to protect Indian tribes *in land transactions*." *Altheimer & Gray*, 983 F.2d at 805, Pet. App. 1 (emphasis added). Further, in

its analysis the Seventh Circuit concludes: "In short, the Tribe did not cede any right, interest or control of Indian lands to MST [the non-Indian]." *Id.* at 812, Pet. App. 14. No support can be found in the actual language of section 81 for the appellate court's invention of a requirement limiting the application of the statute to "land transactions."

The proviso "relative to their lands" is a broad term.[7] Consistent with its purpose, which is to protect Indian tribes from "improvident and unconscionable contracts," *In re Sanborn*, 148 U.S. 222, 227 (1893), the plain language of section 81 protects Indian tribes in much more than land transactions. Granted, land transactions fall within the ambit of section 81; they are, by definition, relative to tribal land. However, it is clear under the literal and usual meaning of the statutory language that Congress intends to cover much more than land transactions, because the relevant inquiry is whether the "services" to be provided under the agreement are "relative to" tribal land.

B. The Seventh Circuit's Decision Conflicts With This Court's Application Of Section 81.

The Supreme Court recognized the breadth of section 81 under the plain language of that statute in *Green v. Menominee Tribe*, 233 U.S. 558 (1914), which involved a contract to supply logging equipment to the Menominee Tribe. A non-Indian supplier was to be paid out of the proceeds of logging. *Id.* at 565. The only connection be-

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[7] A noted treatise on federal Indian law has described § 81, as originally enacted, as "prohibit[ing] *most* contracts between non-Indians and tribes . . . unless approved by the Secretary of Interior and the Commissioner of Indian Affairs." Felix S. Cohen, *Handbook of Federal Indian Law* 143 (1982 ed.) (emphasis added).

tween the supply contract and tribal land was that the logging operation was to take place on the reservation. *Id.* at 563.

Claiming that he had not been paid for the equipment, the supplier brought an action, which was dismissed, *inter alia*, for failure to comply with the requirements of R.S. § 2103, renumbered now as 25 U.S.C. § 81. Affirming the lower court's dismissal, the Supreme Court reasoned:

> [W]e think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered.

Id. at 569.[8]

There is no denying that the Supreme Court found the supply contract in *Green* to be "relative to" tribal land.[9] Crucial to that decision were the facts that the logging operation took place on tribal land, and that section 2103,

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[8] Stated another way, "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), *quoting Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

[9] *See Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 617 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1217 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

renumbered now as section 81, was intended to protect Indian tribes from improvident contracts. In the abstract, the supply contract in *Green* could be said to have no relation to land; the contract was for supplies and equipment in exchange for money. Given the plain language of the statute and the policy underlying it, the Supreme Court correctly applied the statute broadly to protect the Menominee Tribe by reading the supply contract in context. Though merely a supply contract, the agreement was rationally tied to tribal land.

Likewise, in this case, the Letter of Intent is inextricably tied to tribal land. Here, the manufacturing operation on tribal land is to affect tribal land to the point that architectural and engineering drawings and specifications for the manufacturing plant, as well as waste and environmental plans, are necessary. Pet. App. 57. The Letter of Intent, like the agreement in *Green*, specifically implicates Indian lands in the payment of money and the granting of privileges to the non-Indian. For example, the Letter of Intent provides that as a result of the establishment of the manufacturing operations on tribal trust lands, MST is to receive a significant percentage of the net profits off the top and a percentage of all gross sales regardless of whether the venture is profitable. Pet. App. 60-61. In addition, MST is to be given significant control of the development, management and operations of the manufacturing business on tribal trust lands. *Id.* at 58-62. Not surprisingly, the Letter of Intent specifically contemplated needing approval from the Bureau of Indian Affairs of the Department of the Interior. *Id.* at 56.

Although cited by Sioux Manufacturing in its briefs and at oral argument, the Seventh Circuit did not discuss *Green* in its opinion. Instead, the Seventh Circuit attempts to glean authority for limiting the scope of application of

section 81 from a number of recent circuit and district court decisions. 983 F.2d at 811, Pet. App. 12-13. Those cases do not support the Seventh Circuit's decision, as they actually extend, not limit, the statute's application to cover various service agreements. *See Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1404 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988); *A. K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 787 (9th Cir. 1986); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1218 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

C. The Legislative History Of Section 81 Does Not Support The Opinion Below.

The legislative history and policy underlying section 81 support the expansive language of that statute. From the earliest discussions of section 81, there have been two competing policy concerns. First, of course, was the policy to protect Indians from improvident contracts. Cong. Globe, 41st Cong. 3d Sess. 1483-1487 (1871). Secondly, concerns were expressed about hindrances to the Indians' freedom to contract. *Id.* at 1486. Despite the latter concern, Congress elected to enact the original protectionist statute in 1871 utilizing the same broad language which raised those concerns. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570.

The principle targets of the legislation were attorneys and claims agents. *See* Cong. Globe, 41st Cong., 3d Sess. 1483-87 (1871). There is nothing in the legislative history that suggests that section 81 is to be limited to land transactions. An extensive report of the House Committee on

Indian Affairs, which deals with the frauds which the statute was designed to circumvent, indicates that Congress particularly intended to protect against the "godless robbery" of Indians by attorneys and claims agents seeking to enforce agreements calling for the payment of monies or the granting of special privileges. Investigation of Indian Frauds, H.R. Rep. No. 98, 42d Cong., 3d Sess. 1, 5, 7-9 (1873). Further, it is clear from the legislative history surrounding the last occasion when Congress amended section 81, Act of Aug. 27, 1958, Pub. L. 85-770, 72 Stat. 927, that Congress did not desire to limit the protection afforded to Indian tribes by section 81 and that Congress was aware that section 81 applied to "businessmen dealing with tribes." H.R. Rep. No. 2449, 85th Cong., 2d Sess. 1 (1958) *reprinted in* 1958 U.S.C.C.A.N. 3961, 3961.

The present case falls within Congress' intended spirit for section 81. Here an attorney seeks to recover from an Indian tribe the costs of legal services the attorney has purportedly rendered to a client other than the Indian tribe. If the law firm is going to be afforded a contractual remedy to recover the costs of its fees directly from the Tribe, the form and execution of the underlying contract should comply with the protectionist provisions of 25 U.S.C. § 81. Such provisions include expressly identifying the attorney as a party in interest, identifying the amount or rate of the attorney fees and obtaining the requisite approval of the Secretary of the Interior. 25 U.S.C. § 81, Pet. App. 45. In order for Altheimer to have a direct claim against the Tribe, Altheimer should have complied with these requirements.

D. The Seventh Circuit Abdicated Federal Responsibility To Protect Indian Tribes, Which Necessitates Immediate Involvement By This Court.

Prior to the Seventh Circuit's opinion, section 81 had been given broad application by the courts. *See Barona Group of Capitan Grande Band of Mission Indians*, 840 F.2d at 1403-04; *United States ex rel. Shakopee*, 616 F. Supp. at 1216-18. Based on the Seventh Circuit's decision, however, contracts can be drafted to circumvent the protection provided by section 81. All that is needed is a shrewd attorney. The character and magnitude of the potential impact of the opinion below is illustrated by the kinds and types of transactions outsiders are entering into with Indian tribes. For example, outside entrepreneurs are seeking to involve themselves with Indian tribes in disposing toxic and nuclear waste upon Indian lands, in gaming operations on Indian lands, in promoting tribal resource development and in operating and supplying various kinds of businesses on tribal land.[10] Indeed the ramifications of the Seventh Circuit's decision are already being felt.[11]

It is readily apparent that the principles set down by the Seventh Circuit will have an immediate and profound impact on existing and future commercial relationships be-

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[10] *See* Michael Satchell, *Trashing the Reservations?*, U.S. News & World Report, Jan. 11, 1993, at 24; *Gambling; Bugsy and the Indians*, Economist, Mar. 21, 1992, at 27; David Segal, *Dances with Sharks; Why the Indian Gaming Experiment's Gone Bust*, Wash. Monthly, Mar. 1992, at 26.

[11] *See, e.g., In re United States ex rel. Hall*, 1993 WL 246402. (D. Minn. May 27, 1993) (following and further extending the limitations of the scope of § 81 as announced by the Seventh Circuit, 42 lawsuits involving various types of contracts were found not to fall within the scope of § 81).

tween Indian tribes and non-Indians, on tribal lands and on Indian culture and polity. Accordingly, this Court should accept review to expound on the reach of the protectionist provisions of 25 U.S.C. § 81.

CONCLUSION

For the foregoing reasons, this court should grant petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S APPENDIX

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PETITIONER'S APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant,

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 3496—**Suzanne B. Conlon**, *Judge.*

ARGUED OCTOBER 22, 1992—DECIDED JANUARY 8, 1993
AS AMENDED JANUARY 22, 1993

Before POSNER and COFFEY, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

WOOD, JR., *Senior Circuit Judge.* This case deals with the modern application of a 19th century federal statute designed to protect Indian tribes in land transactions. For reasons explained below, we reverse the district court's grant of summary judgment and remand the case for further proceedings.

I. BACKGROUND

In 1872, Congress passed what is now known as 25 U.S.C. § 81. The statute requires contracts concerning Indian lands to be approved by the Secretary of the Interior. Contracts

without the Secretary's approval are of no effect. According to the Supreme Court, the statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227 (1893); *see also Cong. Globe* 1483 (1871) (law is for Indians' "protection and to prevent them from being plundered"). At the time of the law's enactment, Indians apparently were being swindled by dishonest lawyers and claims agents. *See United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co.*, 616 F. Supp. 1200, 1217 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

As this court noted in 1985, Congress has neither implicitly nor explicitly overruled section 81 and the statute continues to "govern[ ] transactions relative to Indian land for which Congress has not passed a specific statute." *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985). The statute, in fact, has seen new life in recent years as Indian reservations have contracted with outside firms to build and operate bingo halls and casinos on their reservations. *See id.*

The case before us also features 25 U.S.C. § 81 and an Indian tribe attempting to generate revenue for its people. Here, though, the tribe chose to reduce its forty-five percent unemployment rate through manufacturing rather than through gambling. To do so, the Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe, created the Sioux Manufacturing Corporation ("SMC") to manufacture and market camouflage cloth and military helmets. SMC is a wholly-owned tribal corporation and governmental subdivision of the Sioux, organized under the Tribe's Law and Order Code. The corporation's offices and sole manufacturing facility are located inside the boundaries of the Devils Lake Sioux Reservation ("Reservation") in Fort Totten, North Dakota, on land which SMC leases from the Tribe. The Reservation itself was established by treaty on February 19, 1867.

Seeking to expand their business, the Tribe and SMC negotiated with Medical Supplies & Technology, Inc. ("MST"),

an Illinois corporation, to manufacture and market latex medical products at the Reservation plant. In the course of these negotiations, MST submitted a "Letter of Intent" to "the Fort Totten Tribe of the Sioux Nation and Sioux Manufacturing Corporation ('Sioux'), to set forth its understanding of the terms of certain proposed transactions by and among MST . . . and an entity wholly-owned, directly or indirectly, by the Sioux." On March 7, 1990, John Veleris, MST's president, and Robert Manning, vice-president and general manager of SMC, signed the nine-page Letter of Intent ("Letter").

According to the Letter, MST, the Tribe, and SMC would engage in a business to produce and market various latex medical products in facilities located on the Reservation. The parties intended that MST would "provide its technology, know-how and expertise in relation to the production and marketing of the Products" whereas SMC would obtain all required governmental approvals, including "any approvals required by the Bureau of Indian Affairs." SMC was also to provide "all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business."

The details of these transactions were to "be discussed further by Seller and Buyer and agreed to in good faith and shall be set forth in various contracts and other agreements." One of the agreements was to be an "Asset Purchase Agreement," whereby SMC would purchase all of MST's assets. These assets included contracts for machines that produce the latex products, architectural drawings for the facility, and waste and environmental plans for the Reservation land. Another future agreement was to be a "Consulting Agreement," whereby MST would provide consulting services to SMC for the management and operation of the latex products business. This would entail MST supplying technical and engineering assistance, marketing the products, and training those individuals that SMC picked for the management and operation of the business.

The Letter also outlined various payments from SMC ("Buyer") to MST ("Seller") for its consulting services and

provided that MST would take up to thirty percent of the latex business's "net profits." The net profit was to be calculated as the difference between gross sales of the latex medical products and:

> (a) cost of materials; (b) wages (in an amount mutually agreeable to Buyer and Seller); (c) utilities and maintenance; (d) salaries and administration (in an amount mutually agreeable to Buyer and Seller); (e) costs paid to Veleris for consulting under the Consulting Agreement; (f) rent; (g) taxes (it being understood, however, that the amount of taxes imposed by tribal authorities to be deducted from Net Profits will not exceed 1% of gross sales); (h) other operational costs (to be agreed to by Buyer and Seller); (i) $83,334 per year; and (j) the Applicable Percentage of depreciation of equipment calculated on a straight line basis over 30 years.

As can be seen above, under the contemplated agreements neither SMC nor MST would be able to unilaterally set salaries or wages or administration costs or other operational costs.

Anticipating future lawsuits, the Letter contained a section entitled "Sovereign Immunity." This section provided that "Buyer and the Fort Totten Tribe of the Sioux Nation (the 'Tribe') will waive all sovereign immunity in regards to all contractual disputes." The section also said that "This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois" and that all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois."

The closing of "the transactions contemplated" by the Letter was to be within sixty days of "acceptance of this Letter of Intent." In the interim, the parties were to fulfill various conditions relating to such topics as financing and distribution. Although neither party was required, by terms of the Letter, to enter into any future agreement until those conditions had been met, "all parties are here-

by bound in good faith to attempt to fulfill all such conditions."

At the end of the Letter comes section 13, upon which this lawsuit is based. Under the title of "Expenses," section 13 outlined a scheme whereby each party would pay its own expenses if "the transactions contemplated herein are consummated." If, however, the transactions were not consummated within the sixty-day period "or if the Sioux at any time notifies any other party that they are terminating negotiations" then "the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees and expenses" incurred by MST in connection with the negotiation of the deal. The Tribe and SMC were relieved from payment, however, if "actions taken in bad faith by Seller" prevented the consummation. In such a case, MST would pay "all reasonable fees and expenses incurred by Buyer."

After the Letter of Intent was signed on March 7, 1990, MST began business operations within the SMC manufacturing facilities. The closing, however, did not occur within the sixty-day period and the parties executed two subsequent agreements to extend the date of closing until November 1, 1990. Despite the extensions, none of the contemplated contracts were ever executed, the deal was never consummated, and MST ceased operations within the Reservation.

II. PROCEDURE

In Spring 1991, SMC was hit with a double-barreled attack. On May 10, 1991, MST sued SMC in Illinois state court for breach of contract. MST contended that SMC failed to act in good faith to satisfy the contractual conditions precedent to closing. On June 5, 1991, MST's law firm, Altheimer & Gray, filed suit against SMC in federal district court. Altheimer is a partnership organized under Illinois law with its principal place of business in Chicago, Illinois; it has 82 partners, all of whom are citizens of Illinois or Indiana. The firm had provided MST with legal services in connection with the negotiations with SMC and

in its suit contended it was an intended third-party beneficiary of section 13 of the Letter of Intent agreement. Altheimer sought payment of $167,593.77 in damages plus interest and costs.

On June 12, 1991, SMC removed MST's action to district court, and on SMC's motion the district court consolidated the two cases. The district court based its subject matter jurisdiction on the diverse citizenship of the parties, pursuant to 28 U.S.C. § 1332. On August 20, 1991, SMC filed a motion to dismiss or, in the alternative, for summary judgment. On November 15, 1991, the district court granted summary judgment to SMC on the ground that the contract was null and void under 25 U.S.C. § 81. On November 29, 1991, Altheimer filed a motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 59(e). On February 14, 1992, the district court entered an order denying that motion. MST did not appeal; Altheimer did, filing its initial Notice of Appeal on March 12, 1992. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

In reviewing a district court's grant of summary judgment, we review de novo the record and the controlling law. *Appley v. West*, 929 F.2d 1176, 1179 (7th Cir. 1991). We will uphold the entry of summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

IV. ANALYSIS

On appeal, the Plaintiff presents these four arguments: 1) the Letter of Intent is not relative to Indian lands, and therefore does not fall within 25 U.S.C. § 81; 2) SMC's obligations under the Letter do not adversely affect any tribal land interest; 3) any ambiguity in the agreement's obligations relative to Indian lands establishes a genuine issue of material fact which precludes summary judgment;

and 4) the obligations of the Letter are severable from the contemplated contracts.

The Defendant responds with these three arguments: 1) the Letter of Intent is relative to Indian lands, and as it does not comply with 25 U.S.C. § 81 the agreement is null and void; 2) as a sovereign, the Sioux are immune from suit; and 3) Altheimer failed to exhaust tribal court remedies and therefore federal court consideration of the case is premature.

As can be seen, the principal dispute between the parties concerns the application of 25 U.S.C. § 81 to the Letter of Intent. It is there that we will begin our analysis.

A. RELATIVE TO INDIAN LANDS

In pertinent part, section 81 reads:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . .
>
> All contracts or agreements made in violation of this section shall be null and void . . . .

25 U.S.C. § 81.

The language of the statute mandates a three-part inquiry into the identity of the contracting parties, the nature of the contract, and whether the contract was approved by the Secretary of Interior. The last inquiry is the easiest to dispose of, as both parties admit the contract formed

by the Letter of Intent was never approved by the Secretary. Our inquiry, therefore, focuses on these two issues: 1) was the disputed contract "with any tribe of Indians," and 2) is the contract "for the payment or delivery of any money or other thing of value . . . or for the granting or procuring any privilege . . . in consideration of services for said Indians relative to their lands"?

1. The Contracting Parties

Although the Letter of Intent was signed by the president of Medical Supplies & Technologies, Inc. and the vice-president of Sioux Manufacturing Corporation, the court below considered the contract to be between the Sioux Tribe and MST. The court did not lightly ignore SMC's corporate status, but recognized that both plaintiff and defendant seemingly considered the Tribe and SMC to be interchangeable.

MST, advised by Altheimer, addressed the Letter of Intent to the "Fort Totten Tribe, Sioux Nation." MST also referred to both the Tribe and SMC collectively as the "Sioux," and listed the "Sioux" as participants in several of the contemplated transactions. Section 13, for instance, states that "if the Sioux at any time notifies any other party that they are terminating negotiations . . . the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees." MST, moreover, seemed to regard the signature of Sioux Manufacturing as binding upon the Tribe itself regarding the waiver of sovereign immunity, choice of law, and forum selection clauses.

Nor does the Defendant in this case consistently distinguish the two entities. In its brief, SMC argues the corporation should be treated as the Tribe and notes the following facts: SMC is located on twenty-seven acres of land held in trust for the Tribe by the United States; under its articles of incorporation, SMC is chartered as "a tribal corporation and government subdivision" of the Tribe; as a governmental subdivision, SMC enjoys federal and tribal law with all privileges and immunities of the Tribe; SMC's

board of directors must include the six sitting members of the Sioux Tribal Council.

Given this alleged unity between SMC and the Tribe, Defendant contends section 81 should apply to the corporation. To support its position, SMC cites *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987). In that case, the Pueblo created the Santa Ana Enterprise ("Enterprise") to generate revenue for the tribe. The Enterprise was a nonprofit instrumentality of the Pueblo of Santa Ana; it was empowered to make contracts, to sue and be sued, but it had no power to bind or obligate the funds of the Pueblo. The Enterprise was not a corporation, did not hold itself out as a corporate entity, and had no shareholders. The tribe leased 100 acres of tribal trust land to the Enterprise and gave it full power to develop and manage the property. The Enterprise in turn contracted with a non-Indian businessman to construct, manage, and maintain a greyhound racetrack on the tribal land. By terms of the contract, neither the Enterprise nor the businessman could encumber the property without the consent of the other. *Id.* at 1302-03.

After the Secretary of Interior refused to approve the facility, banks supporting the racetrack withdrew their funding. This prompted the Pueblo to sue the Secretary. In their suit, the tribe argued that the Secretary's approval was not required since section 81 applies only to agreements between non-Indians and Indian tribes, and the contract was with Santa Ana Enterprise and not the tribe. The district court rejected this argument. According to the court, allowing the Pueblo to evade section 81 through the formation of the Enterprise would undercut Congressional intent: "Congress could not have mandated that the Secretary review all leases and contracts between Indian and non-Indian only to permit the tribes to avoid review when they deem provident." *Id.* at 1306.

The court below accepted the analogy to *Pueblo of Santa Ana*. Altheimer, however, argues that SMC's status as a business corporation is "more than a mere formality" and

contends the contract is with the corporation and not the Tribe. To support this contention, Altheimer cites *Inecon Agricorp. v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981). In that case, the Fort Mojave Indian Tribe created Tribal Farms, an Arizona corporation. The corporation contracted with Inecon, a non-Indian corporation, for agricultural land development and management. After a dispute between the two parties, an arbitrator ruled in Inecon's favor and awarded substantial damages. In a three-page opinion that contained little elaboration or analysis of the disputed contracts, the Ninth Circuit said the contracts were not covered by 25 U.S.C. § 81.

Crucial to the Ninth Circuit's decision was that the contract was with a corporation, rather than the tribe itself: "Tribal Farms is an Arizona corporation and thus does not fall within the protected class of 'tribe of Indians or individual Indians' covered by the statute.' 656 F.2d at 501. Altheimer points out that SMC, unlike the Enterprise in *Pueblo of Santa Ana*, is a corporation with funds and property that are separate and distinct from the Tribe. This, it argues, places the present dispute closer to *Inecon*. We disagree.

Plaintiff ignores the facts of *Inecon*. In *Inecon*, the Ninth Circuit described the Indian tribe has having a "limited role" in the contract. *Inecon*, 656 F.2d at 498. According to the Ninth Circuit, the Fort Mojave Indian Tribe's "sole interest in the contract is its pledge 'not to interfere, hinder, or otherwise obstruct Inecon, its officers, agents or employees in its performance of its contract duties or receipt of its contract rights.' " *Id.* at 501. The Sioux cannot be said to have played such a limited role in the present contract.

We wish to make clear that we do not regard SMC as a "mere formality," but we also do not regard our task as authoritatively delineating the powers of tribal corporations. Nor do we rule on whether a contract with an Indian corporation differs significantly from a contract with an Indian tribe. Instead, we simply agree with the court

below that in analyzing the applicability of section 81 the contract should be viewed as being between an Indian tribe and MST. That being the case, the next step is to analyze the contract to see if it relates to Indian lands.

2. Relation to Indian Land

The next question in our inquiry is whether the contract is "for the payment or delivery of any money or other thing of value . . . or for the granting or procuring any privilege . . . in consideration of services for said Indians relative to their lands"? The district court assumed the Letter of Intent was a valid contract and concluded that the agreement was relative to Indian lands.

Perhaps the determinative factor in the court's decision was the Letter of Intent's first page, which stated that "Seller and Buyer will produce and market various latex medical products . . . in facilities located on the Sioux Reservation located in Fort Totten, North Dakota." The court rejected Altheimer's contention that since SMC leased the land from the Tribe, the contract was outside section 81: "Regardless how one characterizes its present use, the land remains tribal land." *Altheimer & Gray v. Sioux Mfg. Corp.*, Nos. 91 C 3496 & 91 C 3653, 1991 U.S. Dist. LEXIS 16,799, at **16 (N.D. Ill. Nov. 14, 1991), *amended*, 1992 U.S. Dist. LEXIS 1680 (N.D. Ill. Feb. 13, 1992).

This conclusion was further reinforced by the court's determination that the Tribe and SMC were virtually indistinguishable. "The letter of intent," wrote the court, "relates to a business venture between an Indian and a non-Indian organization to be located on tribal land and thus required the approval of the Secretary of Interior." *Id.* at **22. As there was no approval, the court held the letter to be null and void and granted summary judgment to SMC.

We are responsible, in part, for the district court's decision. Looking for guidance on 25 U.S.C. § 81, the court turned to the leading Seventh Circuit opinion on this stat-

ute, *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985). The district court interpreted *Koberstein* as standing for the proposition that the phrase "relative to Indian lands" must be "liberally interpreted to effectuate its purpose of protecting Indian interests," and that this court interprets section 81 as covering "nearly all transactions relating to Indian lands." *Altheimer*, 1991 U.S. Dist. LEXIS 16,799, at **14.

The district court's interpretation of *Koberstein* is not incorrect. As that case held, once a contract is found to relate to Indian lands, section 81 continues to operate. The district court, however, was too liberal in its interpretation of when a contract actually does relate to Indian lands.

In *Koberstein* this court was faced with the validity of a bingo management agreement between the Wisconsin Winnebago Tribe and the non-Indian Ho-Chunk Management Corporation. Under the agreement, Ho-Chunk would construct a bingo hall on tribal trust land. Thereafter, Ho-Chunk had the exclusive right to operate and maintain the hall. The tribe, on the other hand, was forbidden by the contract from encumbering the property without Ho-Chunk's consent. The tribe also could not modify, cancel, or assign the contract. In return for Ho-Chunk's services, it was to receive twenty-five percent of net operating profits. *Koberstein*, 762 F.2d at 614-15.

This court held that such an agreement was relative to Indian lands and therefore subject to section 81's requirements. Crucial to the court's holding were the facts that: 1) the non-Indian party had an absolute right to control the business's operation; 2) the business was located on tribal trust lands; and 3) the contract prohibited the exercise of the tribe's right to encumber tribal trust property. *Id.* at 619.

Koberstein is not alone in considering these facts important. In *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986), the Ninth Circuit also found a bingo hall management agreement to

be related to the Indian land because it gave a "non-Indian contracting party . . . the exclusive right to build and control the operation of the bingo facility located on tribal trust lands and prohibits the Band from encumbering the land." *Id.* at 787.

A year after *A.K. Management*, the Ninth Circuit found a contract relative to Indian land even though the contract did not contain a clause forbidding the Indians to encumber their land. In *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988), the court held that the contract was nonetheless relative to tribal land in that the non-Indian party had the exclusive right to construct and operate the bingo facility on Indian land. *Id.* at 1404. The Ninth Circuit reasoned that neither *A.K. Management* nor *Koberstein* required both exclusive control and an encumbrance clause as the "*sine qua non*" to finding a contract relative to Indian lands. *Id.*

In *United States Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986), the court also went beyond these two factors in finding a contract relative to Indian land. In considering a contract for the construction of a bingo facility, the court noted that unless the bingo hall was located on tribal land, the hall could not legally operate: "The very existence of the bingo operations arises from the Indian tribe's sovereignty over tribal trust lands which makes state gaming laws inapplicable to games on reservations. . . . But for its land, state law would not permit it." 616 F. Supp. at 1218. This persuaded the court that the management agreement was "inextricably tied up in the property rights" and fell under section 81's requirements. *Id.*

Reviewing the relevant cases, it is clear that the following factors are important in determining whether a management contract is relative to Indian lands: 1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party

have the exclusive right to operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign? To quote the Ninth Circuit, none of the above factors are the "*sine qua non*" of a contract which relates to Indian lands. A review of the questions above, however, will show why we believe this contract is not related to Indian lands.

First, the Letter of Intent admittedly envisioned that the latex glove manufacturing operation would be located on the Sioux Reservation. Unlike the bingo hall cases, however, the facility was already in existence, was part of the Tribe's ongoing business, and was wholly owned by the Tribe. Second, neither the Letter nor the contracts contemplated by the Letter would give MST exclusive control over SMC's production of latex medical products. As earlier outlined, MST would be heavily involved in the venture. MST would sell manufacturing contracts and technical plans to SMC, MST would consult on every facet of the business's operation, including the production and marketing, and MST would receive a substantial share of the business's profits. MST, however, did not have unilateral power to set wages and salaries or operation and administration costs. While it may be an understatement to characterize MST solely as a consultant, it would be an overstatement to say MST had exclusive control over the SMC facility.

Third, neither party disputes that there was no provision forbidding the Indians from encumbering their land, either under the Letter of Intent or the contemplated contracts. Finally, the business derived no special benefit from its location on Reservation land. Unlike bingo, manufacturers of latex medical products need not seek refuge from state civil laws by locating on a reservation. As Plaintiff notes, SMC was not obligated to perform on Indian lands. In short, the Tribe did not cede any right, interest or control of Indian lands to MST.

These factors, among others, lead us to hold that neither the Letter of Intent nor the contemplated contract relate

to Indian lands, and therefore the agreement is not subject to section 81. Given our position, it is unnecessary to address the additional arguments that Plaintiff advances. We thus are left to consider Defendant's arguments concerning sovereign immunity and tribal exhaustion.

B. SOVEREIGN IMMUNITY

Indian tribes are considered "domestic dependent nations" which "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 909 (1991). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Id.*; *accord Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

As a wholly-owned governmental subdivision of the Tribe, SMC contends it enjoys the Tribe's sovereign immunity. SMC points to sections 2-2-103 and 10-4-106 of the Sioux's Tribal Law and Order Code ("Code") which reserve sovereign status and immunity for tribal entities. While SMC admits the Tribe may waive its sovereign immunity, SMC contends there was no waiver in this case since SMC and not the Tribe itself signed the Letter of Intent. We find this argument unpersuasive.

The Tribe itself, by passing section 10-4-106(1) of the Code, provides that sovereign immunity may be limited by a tribal entity's charter. SMC's charter does just that, providing that sovereign immunity "is hereby expressly waived with respect to any written contract entered into by the Corporation." SMC Charter § 4.2.2. On similar facts, several courts have considered a tribal corporation's sovereign immunity waived by a written contract. *See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

Even if we did not consider the foregoing a clear waiver of any sovereign immunity SMC may enjoy, we find the Letter of Intent itself forecloses argument on this point. As we mentioned at the outset, the Letter of Intent contains a provision specifically dealing with sovereign immunity. Under that section, SMC and the Tribe agreed to "waive all sovereign immunity in regards to all contractual disputes." Assuming the Letter is a valid contract, we agree with the court below and conclude the Tribe and SMC have waived sovereign immunity.

C. TRIBAL EXHAUSTION

The last issue to be dealt with is whether or not the doctrine of "tribal exhaustion" bars this lawsuit. The doctrine requires litigants, in some instances, to exhaust their remedies in tribal courts before seeking redress in federal courts. The leading cases on tribal exhaustion are *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and it is to these cases that we now turn.

In *National Farmers Union* a Crow Indian minor was hit by a motorcycle in the parking lot of a school located within the Crow Indian Reservation, but on land owned by the State of Montana. Through his guardian, the boy sued the school district in the Crow Tribal Court and the court awarded default damages to the boy. After being notified of the award, the school district and its insurer, National Farmers Union, alleged the existence of a federal question and sought injunctive relief in federal district court. The district court granted the insurance company and school district a permanent injunction against any execution of the tribal court judgment. The Supreme Court found the district court's action premature.

In the Court's opinion, the tribal court should have had "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. 471 U.S. at 856. This meant that the petitioners should "have exhausted

the remedies available to them in the Tribal Court system" before a federal court considered "any relief." *Id.* at 857. This rule, felt the Court, would further Congress's policy of "supporting tribal self-government and self-determination." *Id.* at 856. The Court remanded the case to the district court to determine whether the federal action should be dismissed or stayed pending exhaustion of tribal court remedies. *Id.* at 857.

Two years later, in *Iowa Mutual*, the Court addressed the question of "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." 480 U.S. at 11. The case started when a member of the Blackfeet Indian Tribe filed a complaint in the Blackfeet Tribal Court against his employer and his employer's non-Indian insurance company. The employer was a Montana corporation which was owned by members of the Blackfeet Tribe and operated a ranch on the tribe's reservation.

While the employee's suit was pending in tribal court, the insurance company filed an action in federal district court against the employee and employer alleging it had no duty to defend or indemnify. The district court dismissed the suit for lack of subject-matter jurisdiction, holding that the tribal court should be given the opportunity to determine the tribal court's jurisdiction. The Supreme Court felt dismissal may not have been necessary. As with the doctrine of abstention, the doctrine of tribal exhaustion does not deprive a district court of subject-matter jurisdiction. Exhaustion, the Court explained, is "not a jurisdictional prerequisite," but rather is "a matter of comity." *Id.* at 16 n.8. In addition to dismissing a case, therefore, a district court also has the choice of staying the action pending further tribal court proceedings.

The latter course was the Court's preference in *Iowa Mutual*. The Court felt that the tribal appellate court should have been given the opportunity to review the determination of the lower tribal court: "Until appellate review is complete, the Blackfeet Tribal Courts have not

had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.* at 17. The exhaustion doctrine was to apply regardless of whether the case involved diversity or a federal question. *Id.* at 16.

The Court's decision in this case was motivated by: 1) the federal policy of encouraging tribal self-government; 2) the view that tribal courts "play a vital role in tribal self-government," *id.* at 14-15; and 3) the recognition that "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts." *Id.* at 15. Regarding the scope of a tribal court's jurisdiction, the Court wrote, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.

It is unclear as to how broadly *Iowa Mutual* and *National Farmers* should be read. On one hand, the two Supreme Court cases dealt only with the situation where a tribal court's jurisdiction over a dispute has been challenged by a later-filed action in federal court. On the other hand, the policies underlying the two cases seem broader than this narrow context. Several appellate courts, consequently, have applied the tribal exhaustion rule to cases in which there existed no first-filed tribal court action. *See, e.g., Brown v. Washoe Hous. Auth.*, 835 F.2d 1327 (10th Cir. 1988); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986). Indeed, the Ninth Circuit has suggested that the exhaustion rule applies mandatorily to all cases relating to tribal or reservation affairs. *See, e.g., Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991).

The court below correctly noted, however, that even Circuits favoring a broad reading of the tribal exhaustion rule find it necessary to examine the factual circumstances of each case. This must be done in order to determine whether the issue in dispute is truly a reservation affair

entitled to the exhaustion doctrine. The Ninth Circuit case of *Burlington Northern* is an example of this individualized examination. In that case the Crow Tribe passed an ordinance establishing a tribal commission to regulate railroads crossing their reservation. The only affected railroad obtained a declaratory judgment in federal court that invalidated the ordinance. The appellate court vacated this judgment, ruling that the railroad was required to exhaust Crow tribal remedies before the district court could take action on the complaint.

Central to the court's holding was its view of the ordinance as being integral to the tribe's self-government and self-determination. The court saw the ordinance both as an assertion of the tribe's sovereign authority and as an instrument of exercising authority over services vital to the tribe's economic development. The court viewed the tribe's economic independence as the "foundation of self-determination." 940 F.2d at 1245. "Thus arises the necessity for . . . exhaustion of tribal remedies: the Crow Tribe must itself interpret its own ordinance and define its own jurisdiction." *Id.* at 1246. *See also Weeks Construction*, 797 F.2d at 673 (contract dispute "arose on the reservation and raises questions of tribal law interpretation within the province of the tribal court").

In the present dispute, the district court found this case to be "a poor candidate for a precedent-setting application of the tribal exhaustion rule." *Altheimer & Gray v. Sioux Mfg. Corp.*, Nos. 91 C 3496 & 91 C 3653, 1991 U.S. Dist. LEXIS 16,799, at **9 (N.D. Ill. Nov. 14, 1991), *amended*, 1992 U.S. Dist. LEXIS 1680 (N.D. Ill. Feb. 13, 1992). As the court observed, the principal dispute between the parties concerns the application of a federal statute, 25 U.S.C. § 81, to the Letter of Intent. The other issues in this litigation concern a contract that both parties agreed would be interpreted under Illinois law. To apply the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by laws of distant jurisdictions. *Cf. Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp.

753 (D.N.D. 1989) (dismissal not necessary where federal issues predominate).

The interpretation of another jurisdiction's laws, however, does not alone foreclose application of the tribal exhaustion rule. A tribal court, presumably, is as competent to interpret federal law as it is state law. *See Iowa Mutual*, 480 U.S. at 19 (alleged incompetence of tribal courts not an exception to exhaustion requirement). The tribal court's potential task of interpreting unfamiliar law, however, does show the dissimilarity of the present case as compared with *National Farmers* and *Iowa Mutual*. Here, there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law.

More importantly, we believe the application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* and *National Farmers*. As discussed above, the Supreme Court was concerned with implementing Congress's policy of tribal self-government. The Court feared that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16. *See generally Duro v. Reina*, 495 U.S. 676, 692 (1990) (history of modern tribal courts indicate they embody only powers of internal self-governance).

In this case, however, the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum. In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of

choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

V. CONCLUSION

The judgment of the district court granting summary judgment in SMC's favor is reversed. We remand for proceedings consistent with this opinion. Each party shall bear its own costs.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated November 14, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY,	)	
	)	
Plaintiff,	)	
	)	No. 91 C 3496
v.	)	
	)	Judge Suzanne B. Conlon
	)	
SIOUX MANUFACTURING CORPORATION,	)	
	)	
	)	
Defendant.	)	
	)	Consolidated With
	)	
HEALTH CARE SERVICES, LTD. and JOHN VELERIS,	)	
	)	
	)	
Plaintiffs,	)	No. 91 C 3653
v.	)	
	)	Judge Suzanne B. Conlon
	)	
SIOUX MANUFACTURING CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In this consolidated diversity action for breach of contract, plaintiff Health Care Services, Ltd. ("Health Care"), its president, John Veleris ("Veleris"), and the law firm of Altheimer & Gray (collectively "plaintiffs") sue defendant Sioux Manufacturing Corporation ("Sioux Manufac-

turing").[1] Health Care and Veleris allege that a March 7, 1990 letter of intent between Sioux Manufacturing and Health Care constituted a binding contract under which Health Care would develop and manage a manufacturing facility within the borders of the Devils Lake Sioux Tribal Reservation in Fort Totten, North Dakota. Altheimer & Gray seeks legal fees it is allegedly due as a purported third party beneficiary under the same March 7 letter of intent. Alternatively, Sioux Manufacturing moves for dismissal or summary judgment. Sioux Manufacturing contends that the tribal court exhaustion rule counsels that the court decline to exercise its diversity jurisdiction until plaintiffs exhaust available tribal court remedies. Alternatively, Sioux Manufacturing asserts that the letter of intent is void, as a matter of law, because it does not bear the approval of the Secretary of the Interior, as required under 25 U.S.C. § 81.

BACKGROUND

Health Care is an Illinois corporation with its principal place of business in Cook County, Illinois. Health Care complaint ¶ 1; Sioux Manufacturing 12(m) Statement of Material Facts ("Sioux Manufacturing facts") ¶ 6. Sioux Manufacturing is a tribally chartered corporation and governmental subdivision of the Devils Lake Sioux Tribe ("the Tribe"), organized under the Tribe's Law and Order Code, § 10, ch. 4. *Id.* ¶ 2; Sioux Manufacturing facts ¶ 1.

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[1] At the time of the events at issue, plaintiff Health Care operated under the name Medical Supplies & Technology, Inc. Plaintiff Veleris was president of Medical Supplies & Technology, Inc. Medical Supplies recently changed its name to Health Care Services, Limited. For the sake of clarity, the corporate plaintiff will be referred to as Health Care, the name under which it brings this action.

Sioux Manufacturing's offices and sole facility is located within the exterior boundaries of the Devils Lake Sioux Tribal Reservation in Fort Totten, North Dakota. *Id.*; Sioux Manufacturing facts ¶ 5. Sioux Manufacturing is the largest employer and source of government revenue on the Devils Lake Sioux Tribal Reservation. Sioux Manufacturing facts ¶¶ 12-14; Altheimer & Gray 12(n) Statement of Material Facts ("Altheimer & Gray facts") ¶¶ 12-14.

On March 7, 1990, Veleris, acting in his capacity as president of Health Care, entered into an agreement designated as a "letter of intent" with Sioux Manufacturing. *Id.* ¶ 3; Exh. B. The agreement contemplated a relationship in which Health Care would sell to Sioux Manufacturing the necessary industrial equipment for and provide its expertise in the production and marketing of various latex medical products in facilities to be located on the tribal reservation. Letter of intent at 1. The letter of intent stated that Health Care would act as exclusive management consultant to Sioux Manufacturing regarding the operation of the business, in return for which Health Care would receive a consulting fee and a significant share of net profits for as long as six and one-half years. *Id.* §§ 3-8. The agreement further stated an understanding that Health Care and Sioux Manufacturing subsequently would enter into a series of contractual agreements setting out in greater detail the nature of their respective obligations. *Id.* at 1. Additionally, the terms of the agreement expressly stated that neither party was obligated to enter the future agreements unless certain express conditions precedent had been met. *Id.* § 1.

The letter of intent contained an expenses clause obliging "the Sioux" to pay "all reasonable legal and accounting fees and expenses" incurred by Veleris and Health Care in the negotiation of the letter of intent and any

of the contemplated subsequent contracts in the event that the parties did not consummate the contracts by the designated closing date. *Id.* § 13. Altheimer & Gray, a Chicago-based law firm, provided Health Care with legal services in connection with the negotiation of the letter of intent.

The agreement contemplated the closing of all subsequent contracts within sixty days of the acceptance of the letter of intent. *Id.* However, Sioux Manufacturing and Health Care executed two subsequent agreements that extended the closing deadline until November 1, 1990. Health Care complaint ¶ 6; Sioux Manufacturing facts ¶ 23. Following the execution of the letter of intent, but prior to the consummation of any of the contracts contemplated under the letter of intent, Health Care and Veleris began operations on the Devils Lake Sioux Reservation. Sioux Manufacturing facts ¶¶ 21, 22; Altheimer & Gray facts ¶¶ 21, 22.

Health Care contends that Sioux Manufacturing failed to act in good faith to satisfy contractual conditions precedent, and in particular, failed to arrange project financing. Health Care complaint ¶ 7. Sioux Manufacturing's failure to meet its obligations precluded a November 1, 1990 closing. *Id.* ¶ 8. After November 1, 1990, Sioux Manufacturing refused to undertake further efforts satisfy the terms of the letter of intent. *Id.* ¶ 9. Health Care contends that Sioux Manufacturing's conduct constitutes a unilateral breach of contract and a breach of the express and implied covenant of good faith governing the agreement. *Id.* ¶ 10. Health Care seeks over $7,000,000 in damages for expenses and loss of earnings. Altheimer & Gray, filing a claim as a purported third party beneficiary to the letter of intent, seeks payment for legal services it provided in connection with the Health Care-Sioux Manufacturing venture.

DISCUSSION

Sioux Manufacturing characterizes its motions as alternative motions for dismissal or summary judgment. Both Sioux Manufacturing and plaintiffs extensively rely upon affidavits and exhibits submitted in connection with the present motions. Consequently, Sioux Manufacturing's motions are treated as summary judgment motions. *See* Fed. R. Civ. P. 12(c).

Summary judgment must be granted when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 959 (7th Cir. 1989). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989). The nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir. 1990). All reasonable inferences must be viewed in favor of the nonmoving party. *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989).

I. Tribal Exhaustion

Sioux Manufacturing contends that the tribal exhaustion rule articulated in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), warrants dismissal or a stay of federal court proceedings until Health Care and Altheimer & Gray exhaust their tribal remedies. Under

the rule, exhaustion of tribal remedies is regarded as a prerequisite to a federal court's exercise of diversity jurisdiction in certain cases related to reservation affairs. *Id.* In both *Iowa Mutual* and *National Farmers Union*, a non-Indian challenged a tribal court's exercise or claim of jurisdiction in a prior-filed tribal court action. The Supreme Court, noting the federal government's longstanding policy of encouraging tribal self-government and self-determination, held that a federal court, as a matter of comity, should defer the exercise of its jurisdiction in a case "relating to reservation affairs" to give a tribal court a full opportunity to determine and exercise its own jurisdiction. *Iowa Mutual*, 480 U.S. at 15.

In the present action, there is no competing tribal court case to bring this case directly within the facts of *National Farmers Union* and *Iowa Mutual*. The scope of the tribal exhaustion rule is a question of first impression in this circuit. The courts of appeal in other circuits, however, have applied the tribal exhaustion rule to cases in which there existed no first-filed tribal court action competing with the federal action. *See, e.g., Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988); *Weeks Construction, Inc. v. Oglalla Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986). But even in extending the application of the rule, circuit courts appear internally divided over the full extent of its scope.

Within the Ninth Circuit, for example, some decisions suggest that the rule applies mandatorily to all cases relating to tribal or reservation affairs, *see, e.g., Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991); *see also Weeks Constr., Inc.*, 797 F.2d 668 (8th Cir. 1986). Yet, in cases within the same circuit, the court expressly held that the rule does not apply mandatorily, but instead "countenance[s] an examination of the

circumstances of the action before a decision to defer is made." *Stock West Corp. v. Taylor*, 942 F.2d 655, 660-61 (9th Cir. 1991); *see also United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Myrick v. Devils Lake Sioux Manufacturing Corporation*, 718 F. Supp. 753 (D.N.D. 1989). The limited circumstances where the Supreme Court has applied the tribal exhaustion rule suggest the latter measured and contextual application of the rule.

The present case offers truly unique circumstances that make it a poor candidate for a precedent-setting application of the tribal exhaustion rule. However, in deference to the considerations of comity animating the rule, the following observations are appropriate.

The principal dispute between the parties concerns the validity of the letter of intent. Sioux Manufacturing asserts that the letter of intent is invalid because it does not bear the approval of the Secretary of Interior, required under 25 U.S.C. § 81. Health Care contends that the letter of intent is not subject to § 81 protection. The application of the tribal exhaustion rule with respect to this potentially determinative issue would place before the tribal court a dispute essentially dependent upon the construction and application of federal law.

The second observation assumes that the letter of intent is valid. Section 9 of the letter of intent reads:

> [Sioux Manufacturing] and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes. This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. [Sioux Manufacturing], [Health Care] and the Tribe agree to submit to the venue and jurisdiction of the federal and state

> courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts. [Sioux Manufacturing] and the Tribe appoint [a named designee] to accept service of process in any such dispute. [Sioux Manufacturing], [Health Care] and the Tribe hereby waive their respective rights to demand a jury trial.

This language manifests an unambiguous intent that all disputes be resolved under Illinois law in the federal and state courts located in Illinois. Sioux Manufacturing takes issue with any construction of the letter of intent that regards the forum selection clause as constituting a waiver of exhaustion. Sioux Manufacturing's position is plainly contrary to the clear import of the forum selection language. Its position arguably raises the specter of a bad faith assertion of tribal jurisdiction, which the Supreme Court has recognized as an exception to the tribal exhaustion rule. *National Farmers Union*, 471 U.S. at 856 n.21. However, the court need not address the issue of Sioux Manufacturing's good faith in asserting tribal jurisdiction. It is irrefutable that Illinois law governs the execution and interpretation of the letter of intent, regardless of venue. In this respect, application of the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by application of the law of a distant state.

Because these consolidated cases raise issues that principally depend upon application of federal law on the § 81 issue and Illinois law on the merits of the contractual dispute, many reported exhaustion rule cases in which the disputes principally involved issues of tribal law are inapposite. In *Burlington Northern*, for example, the validity of a tribal ordinance regulating common carriers operating on reservation land was challenged. The ordinance had yet to be construed because Burlington Northern had

not challenged the new ordinance in either the tribal administrative or judicial court system. The Ninth Circuit held that deferring the exercise of jurisdiction would allow the tribal court to interpret its own ordinance and thus " 'provide other courts with the benefit of their expertise in such matters.' " 940 F.2d at 1246, quoting *National Farmers Union*, 471 U.S. at 857; *see also Weeks Constr., Inc.*, 787 F.2d at 673 (exhaustion required where facts show that contract dispute "raises questions of tribal law interpretation within the province of the tribal court"). Where "[t]here is no pending tribal court proceeding, the principal issues presented are of state or federal law, and the tribal court possesses no special expertise in the subject matter," comity does not suffice as a basis for deferral of the exercise of federal jurisdiction. *Stock West*, 942 F.2d at 663; *see also Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989) (tribal exhaustion not required in age and race discrimination suit brought by Indian living on reservation against corporation of which tribe was majority owner because federal law issues predominated). Accordingly, Sioux Manufacturing's motion for a stay of proceedings based on tribal exhaustion rule is denied.

II. Failure to Obtain Approval of Secretary of Interior Under 25 U.S.C. § 81

Sioux Manufacturing asserts that the letter of intent creates no enforceable contractual obligations because it does not bear the approval of the Secretary of the Interior required under 25 U.S.C. § 81. Section 81 provides in relevant part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any

> money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: . . . . It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

The Seventh Circuit, in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), after thorough examination of the history of § 81, concluded that the broad statutory language extending protection to transactions "relative to [Indian] lands" must be liberally interpreted to effectuate its purpose of protecting Indian interests. *Id.* at 617-18. The Court thus regarded § 81 as covering nearly all transactions relating to Indian land. *Id.*

Health Care and Veleris effectively contend that the letter of intent bound Sioux Manufacturing to enter into the contemplated venture of developing and operating a manufacturing facility to produce latex products. Altheimer & Gray characterizes the letter of intent as merely an agreement for the allocation of negotiation costs relating to the contemplated business venture between Health Care and Sioux Manufacturing. The differing constructions of the letter of intent are of no significance to the question of the applicability of § 81 in the present case.

The letter of intent is expressly directed toward the development and management of a manufacturing facility to be located "on the Sioux Reservation." Exh. B. at 1. Sioux Manufacturing contends that this language clearly demonstrates that the letter of intent relates to Indian

lands and thus is governed by § 81. Plaintiffs do not dispute the import of this language as indicating that the contemplated facility would be located within the exterior boundaries of the Fort Totten Sioux tribal reservation. Instead, plaintiffs respond that the contemplated operation is not relative to Indian land because the facility was to be located on land that has been assigned by the Devils Lake Sioux Tribal Council to Sioux Manufacturing. Therefore, plaintiffs argue, the land should be regarded as private corporate land beyond the scope of § 81 protection rather than tribal land. The application of § 81 thus depends on the proper characterization of land that is indisputably located on the Sioux Reservation.

Significantly, plaintiffs fail to justify their position in light of the fact that Sioux Manufacturing does not own the land in question, but merely leases trust land from the tribe. McKay Aff. § 5. Regardless how one characterizes its present use, the land remains tribal land. Moreover, plaintiffs' argument also fails to address the significance of Sioux Manufacturing's status as an arm of the Sioux tribal government.

Under its articles of incorporation, Sioux Manufacturing is chartered expressly as "a tribal corporation *and government subdivision* of the Devils Lake Sioux Tribe pursuant to Title 10, Chapter Four of the Devils Lake Sioux Law and Order Code." Sioux Manufacturing Corp. Articles of Confederation §§ 1.2, 4.1 ("Articles") (appended to Altheimer & Gray memorandum in opposition to Sioux Manufacturing's motion for summary judgment) (emphasis added). As a governmental subdivision, Sioux Manufacturing is "clothed by federal and tribal law with all privileges and immunities of the Tribe." *Id.* § 4.21. Additionally, despite its corporate designation, Sioux Manufacturing is "owned in its entirety by the Devils Lake Sioux Tribe," *Id.* § 1.5; McKay Aff. § 3; *see* Exh. B. at p.1.

In determining the significance of Sioux Manufacturing's status as an arm of the tribal government, *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987), is instructive. In *Pueblo of Santa Ana*, the Pueblo tribal governing body created a non-profit enterprise whose stated purpose was to provide for the health, education, and welfare of the Pueblo through the creation of business opportunities and utilization of tribal resources. To this end, the tribal enterprise was empowered to encumber its interests in specifically assigned or leased tribal lands, and to make contracts and sue and be sued in its organizational name. Any agreements made by the tribal enterprise were binding on the corporation alone, with the Pueblo tribe and its officers protected from any resulting liability.

The tribal enterprise executed a long-term contract with a non-Indian consultant for the development, management and operation of a greyhound racing track on tribal property leased to the enterprise. The Secretary of the Interior was not favorably disposed to the project. The tribal enterprise, in conjunction with the tribe, filed an action in federal court contesting whether § 81 governed the contract between the tribal enterprise and the non-Indian management consultant. The tribal enterprise contended that it was not a tribal entity for purposes of the contract with the non-Indian consultant. It argued that its contract with the non-Indian consultant was not subject to § 81 review. The district court rejected this argument, concluding that "Congress could not have mandated that the Secretary review all leases and contracts between Indian and non-Indian only to permit tribes to avoid review when they deem provident." 663 F. Supp. at 1306. Thus, the district court held that § 81 review and approval applied.

Sioux Manufacturing bears many of the same attributes of the tribal enterprise in *Pueblo of Santa Ana*. The stated purposes of Sioux Manufacturing include providing general and specific "revenue to the Tribe to fund programs regarding public health, safety, welfare and for other tribal purposes," Articles §§ 3.2, 3.11-.20; McKay Aff. § 3. The letter of intent between Health Care and Sioux Manufacturing itself reflects another of Sioux Manufacturing's enumerated governmental purposes by expressly stating that Health Care will aid Sioux Manufacturing in implementing hiring guidelines that accord with Sioux Manufacturing's "desire that the Business be operated in a manner which reduces unemployment among the people of the Fort Totten Tribe of the Sioux Nation." Letter of Intent § 3; *see* Articles § 3.1.

That the purposes of Sioux Manufacturing are closely tied to the advancement of core tribal governmental concerns is not surprising in light of the fact that Sioux Manufacturing is the "chief source of tribal income and employment." Devils Lake Sioux Tribe Resolution No. AO5-89-191; McKay Aff. § 7. The interrelationship of Sioux Manufacturing and the Tribe is further reflected in the organizational structure of Sioux Manufacturing. As in *Pueblo of Santa Ana*, the Tribal Council, the governing body of the Sioux Tribe, controls all appointments to the Sioux Manufacturing board of directors. McKay Aff. § 4. Moreover, half of the Sioux Manufacturing board must be comprised of the six sitting members of the Sioux Tribal Council, with the Tribal Council Chairman sitting as the chairman of the Sioux Manufacturing board. *Id.*

Finally, the letter of intent strongly suggests that plaintiffs themselves viewed the Tribe and Sioux Manufacturing as closely interrelated. According to plaintiffs, the parties to the letter of intent were Health Care, its officers, and Sioux Manufacturing. Yet the language of the letter

of intent clearly suggests that plaintiffs regarded the Tribe as an active participant in the contemplated transactions. Various provisions of the letter of intent, including the allocation of expenses clause upon which Altheimer & Gray bases its claim, are directed to both the Tribe and Sioux Manufacturing, referring to them collectively as "the Sioux."[2] Letter of intent § 13.

The letter of intent does refer to the Tribe individually, as distinct from Sioux Manufacturing. For instance, the provision containing the waiver of sovereign immunity, choice of law and forum selection clauses is directed individually to the Tribe, as well as to Sioux Manufacturing. Letter of intent § 9. Yet the letter of intent contains only signature blocks for representatives of Health Care and Sioux Manufacturing. *Id.* at p. 9. Thus, plaintiffs appear to have regarded the signature of Sioux Manufacturing as generally binding the Tribe itself to the terms of the letter of intent.

Sioux Manufacturing's enumerated purposes, organizational structure, and impact on the tribal community are fully consistent with its express designation as an arm of the tribal government. The plaintiffs, as drafters of the letter of intent, also appear to have regarded Sioux Manufacturing and the Tribe as essentially the same entity.

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[2] The shifting designation of the Tribe and Sioux Manufacturing arguably creates some ambiguity in the meaning of the expenses clause allocating to "the Sioux" the costs of legal fees incurred in negotiations. Under Illinois law, ambiguous contract language is generally construed against the drafter of the language. Here, Altheimer & Gray drafted the agreements as counsel for Health Care. *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 505 N.E.2d 314, 319 (1987). Thus, Altheimer & Gray's claim, though based on a more narrowly tailored construction of the letter of intent than that asserted by Health Care, also appears to be based on language that directly binds the Tribe as well as Sioux Manufacturing.

Under these circumstances, the tribal law designation of Sioux Manufacturing as a corporation for the apparent purpose of protecting the Tribe's larger trust holdings should not be viewed as removing Sioux Manufacturing and the leased tribal land on which its facilities are located from the broad scope of § 81 review. The letter of intent relates to a business venture between an Indian and a non-Indian organization to be located on tribal land and thus required the approval of the Secretary of Interior. Absent that approval, the letter of intent is null and void under § 81. Sioux Manufacturing is entitled to judgment as a matter of law because plaintiffs' breach of contract claims are based upon an invalid contract.[3]

CONCLUSION

Sioux Manufacturing's motion to stay proceedings under the tribal exhaustion rule is denied. Sioux Manufacturing's motion for summary judgment on the grounds that the letter of intent is null and void under 25 U.S.C. § 81 is granted. Judgment is entered for defendant Sioux Manufacturing Corporation and against plaintiff Altheimer & Gray (Case No. 91 C 3496), and for defendant Sioux Manufacturing Corporation and against plaintiffs Health Care Services, Ltd. and John Veleris (Case No. 91 C 3653).

ENTER:

/s/ SUZANNE B. CONLON
Suzanne B. Conlon
United States District Judge

November 14, 1991

[3] Because the court finds the letter of intent void under § 81, there is no need to reach the issue whether the letter of intent is void under other statutory provisions advanced by Sioux Manufacturing.

[Dated February 13, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY, Plaintiff, v. SIOUX MANUFACTURING CORPORATION, Defendant.	No. 91 C 3496 Judge Suzanne B. Conlon
Consolidated With	
HEALTH CARE SERVICES, LTD. and JOHN VELERIS, Plaintiffs, v. SIOUX MANUFACTURING CORPORATION, Defendant.	No. 91 C 3653 Judge Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Plaintiffs Altheimer & Gray and Health Care Services, Inc. ("Health Care") (collectively "plaintiffs") move pursuant to Fed. R. Civ. P. 59(e) to vacate this court's grant of summary judgment to defendant Sioux Manufacturing Corporation ("Sioux Manufacturing") on plaintiffs' consoli-

dated breach of contract claims. *See* Memorandum Opinion and Order of November 14, 1992. Summary judgment was granted in favor of Sioux Manufacturing because the agreement at issue had not been approved by the United States Department of the Interior as required by 25 U.S.C. § 81 for agreements for services to Indians relative to Indian lands.

DISCUSSION

Plaintiffs respectfully move to vacate this court's grant of summary judgment in favor of defendant Sioux Manufacturing to the extent that judgment applied to a negotiation cost allocation provision contained in the letter of intent between Health Care and Sioux Manufacturing. As an initial matter, the court must address Sioux Manufacturing's contention that Health Care's motion is untimely.

I. Timeliness of Health Care's Rule 59(e) motion

Rule 59(e) motions must be filed "not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e); *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 110 (7th Cir. 1985). Judgment was entered in the present action on November 15, 1991, at the time this court's November 14, 1991 order was docketed with the clerk of court. Health Care filed its present Rule 59(e) motion on December 3, 1991.

Health Care asserts that its December 3, 1991 filing meets the ten day statutory period, excluding holidays and weekends. Health Care's calculation is erroneous. December 3, 1991 was the eleventh working day to follow the November 15, 1991 entry of order. Health Care erred in calculating the day after Thanksgiving as a court holiday. In support of its contention that the day following Thanksgiving was a holiday, Health Care submits a legal notice

showing the day after Thanksgiving to be a legal holiday of the Illinois *state* court system. State court holidays, of course, have no bearing on the operation of the federal court system. District courts lack the authority to extend the mandatory ten day period for filing Rule 59(e) motions. *Marane, Inc.*, 755 F.2d at 111. Accordingly, Health Care's motion is denied as untimely.

II. Altheimer & Gray's Motion

Altheimer & Gray raises two arguments in support of its motion to vacate. First, Altheimer & Gray contends the March 7, 1990 agreement between Health Care and Sioux Manufacturing did not impose any obligation regarding the use of Indian land and was therefore not subject to the approval of the Secretary of the Interior pursuant to 25 U.S.C. § 81. Altheimer & Gray asserts that each signatory to the agreement intended to obligate itself only to bear the negotiation costs of the other under certain specified conditions.

Altheimer & Gray argument merely reasserts issues addressed by the court in granting Sioux Manufacturing's motion for summary judgment. Under 25 U.S.C. § 81, the Secretary of the Interior's approval is required not only for agreements regarding the *use* of Indian land, as Altheimer & Gray argues. Rather, § 81 requires the Secretary of the Interior's approval of all agreements "relative" to Indian land. 25 U.S.C. § 81. Altheimer & Gray's argument tying the application of § 81 to agreements for the actual use of Indian lands runs counter to the federal court's unfailingly expansive construction of the term "relative to [Indian] lands" as providing § 81 with an extraordinarily broad scope. Indeed, the Seventh Circuit in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), recently reviewed a frontal attack on

the broad scope of § 81 afforded under the "relative to [Indian] land" provision. After a thorough examination of the history and application of § 81, the Seventh Circuit concluded that the statutory language requiring approval of agreements "relative to [Indian] lands" must be interpreted liberally to cover nearly all transactions relating to Indian lands. *See Koberstein*, 762 F.2d at 617-18.

Altheimer & Gray's attempt to avoid the pervasive scope of § 81 by asserting that the signatories to the agreement did not intend to commit themselves to obligations that would bring the agreement within the scope of § 81 scrutiny does not deflect from the fact that the agreement was inextricably rooted in a planned transaction regarding Indian land. Moreover, if the intent of signatories to an agreement relative to Indian land dictated when § 81 scrutiny applies, contracting parties could readily thwart Congress' clear intent to protect Indians from " 'improvident and unconscionable contracts,' " *Koberstein*, 762 F.2d at 617, quoting *In re Sanborn*, 148 U.S. 222, 227 (1893).

Altheimer & Gray advances a second argument in which it contends that the negotiation cost allocation provision is separable from the remainder of the agreement and thus, standing alone, did not require the approval of the Secretary of the Interior pursuant to 25 U.S.C. § 81. Acceptance of Altheimer & Gray's separability argument would also undermine Congress' broad protective purpose in enacting § 81. *Id.* Parties could effectively enforce individual provisions of an agreement relating to Indian lands that had not been approved by the Secretary of Interior merely by artfully drafting the provisions in a manner permitting separability.

Altheimer & Gray cites *Rollins and Presbrey v. United States*, 23 Ct. Cl. 106 (1888) as supporting its separability argument. However, *Rollins and Presbrey* is factually distinguishable from the present case. *Rollins and Presbrey* involved a claim by attorneys for an Indian tribe to enforce a single contractual provision that had been separately approved by the Secretary of the Interior, even though it was part of a contract that the Secretary of the Interior had not approved in its entirety. The court held that the individually approved provision was separable and separately enforceable. 23 Ct. Cl. at 124-125. In the present action, the negotiation cost allocation provision that provides the purported basis of Altheimer & Gray's claim was not approved by the Secretary of the Interior, unlike the provision the court in *Rollins and Presbrey* held to be separable. Thus, *Rollins and Presbrey* is inapposite.

Finally, in the course of presenting its arguments in support of its motion to vacate, Altheimer & Gray highlights certain evidence that calls into question the factual accuracy of a footnote comment in the November 14, 1991 memorandum opinion. The court suggested that any ambiguity in the language of the agreement should be construed against Altheimer & Gray as the drafter of the agreement. *See* November 14, 1991 Memorandum Opinion and Order at 15 n.2 & 16. Altheimer & Gray correctly notes that the affidavit of attorney Martha Haines, appended as Exhibit A to Altheimer & Gray's response to Sioux Manufacturing's motion for summary judgment, states that the agreement incorporates language jointly drafted by both parties. Haines Aff. ¶ 10. Accordingly, any ambiguities that might exist in the language of the agreement should not necessarily be construed against Altheimer & Gray. Accordingly, the November 14, 1991 memorandum shall be amended to exclude the challenged *dicta*.

CONCLUSION

Plaintiff Health Care's Fed. R. Civ. P. 59(e) motion to vacate is denied as untimely. Plaintiff Altheimer & Gray's motion to vacate is denied. The court's memorandum opinion of November 14, 1991 is amended by deletion of footnote 2 on pages 15-16.

ENTER:

/s/ SUZANNE B. CONLON
Suzanne B. Conlon
United States District Judge

February 13, 1992

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 1993

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant,

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 3496—Suzanne B. Conlon, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee Sioux Manufacturing Corporation on January 22, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 8, 1993

BEFORE:

Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Harlington Wood, Jr., Senior Circuit Judge

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 3496, Judge Suzanne Conlon

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED and this cause is REMANDED, in accordance with the decision of this court entered this date. Each party is to bear its own costs.

25 U.S.C. § 81

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the in-

surer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646.)

Devils Lake Sioux Tribal Law and Order Code

* * * * *

Title 2: Courts

* * * * *

§2-2-103. **Suits Against the Tribe.**

(1) **Sovereign Immunity of Tribe.** The sovereign immunity of the Tribe and every elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, against suit in any court, federal, state or tribal is hereby affirmed, and nothing contained within this Code shall be deemed to constitute a waiver of such sovereign immunity. The Tribal Court shall have no jurisdiction over any suit brought against the Tribe without the consent of the Tribe.

(2) **Tribal Action Not Waiver of Sovereign Immunity.** Nothing in this Code, and no enforcement action taken pursuant to it, including the filing of an action by the Tribe or any agency of the Tribe in the Tribal Court, shall constitute a waiver of sovereign immunity of the Tribe, or any elected Tribal Council member or tribal official with respect to any action taken in an official capacity, or in the exercise of the official powers of any such office, either as to any counterclaim, regardless of whether the counterclaim arises out of the same transaction or occurrence, or in any other respect.

(3) **Waiver of Sovereign Immunity.** Sovereign immunity of the Tribe and any elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, in any action filed in the Tribal Court with respect thereto, may be waived only by express resolution of the Tribal Council after consultation with its attorneys. All waivers of sovereign immunity must be preserved

with the resolutions of the Tribal Council of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to insure that substantial justice can be done by the Tribal Court in any such action. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, action, and property or funds, if any, of the Tribe or any agency of the Tribe subject thereto. No express waiver of sovereign immunity by resolution of the Tribal Council shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe or any agency of the Tribe other than property specifically pledged or assigned.

§2-2-104. **Concurrent Jurisdiction; Exhaustion of Tribal Remedies.**

The jurisdiction invoked by this Code over any person, cause or subject shall be concurrent with any valid federal jurisdiction by the courts of the United States, provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity which does already have such jurisdiction under existing law. Nothing in this Code waives the requirement of exhaustion of tribal remedies, both administrative and judicial, which may only be waived by the Tribal Council in the same manner as it may waive sovereign immunity.

* * * * *

Title 10: Corporations and Tribal Entities

* * * * *

§10-4-104. **Status of a Tribal Entity.**

(1) For purposes of taxation, regulatory jurisdiction and civil jurisdiction, a tribal entity created pursuant to the sovereign powers of the Tribe shall be deemed to be a subordinate arm of the government of the Tribe and shall be entitled to all of the privileges and immunities of the Tribe.

(2) The Tribal Court shall have jurisdiction to decide all questions with respect to the status of a tribal entity formed pursuant to the sovereign powers of the Tribe.

* * * * *

§10-4-106. **Sovereign Immunity and Waiver.**

(1) **Sovereign Immunity of the Tribal Entity.** A tribal entity is clothed by federal law with all the privileges and immunities of the Tribe, except as specifically limited by the tribal entity Charter, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Chapter shall be deemed or construed to be a waiver of sovereign immunity of a tribal entity from suit or to be a consent of the tribal entity or the Tribe, to the jurisdiction of the United States or of any state with regard to the business or affairs of the tribal entity or to any cause of action, case or controversy, except as provided herein.

(2) **Waiver of Sovereign Immunity of the Tribal Entity.** Sovereign immunity of the tribal entity may be waived only by express resolution of the governing body of the tribal entity after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the governing body of the tribal entity of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the tribal entity. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the tribal entity subject thereto, court having jurisdiction pursuant thereto and law applicable thereunder. Neither the power to sue and be sued provided in the charter of the tribal entity, nor any express waiver of sovereign immunity by resolution of the tribal entity shall be deemed a consent to the levy of any judgment, lien or attach-

ment upon property of the tribal entity other than property specifically pledged or assigned, or any property of the Tribe, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

(3) **Sovereign Immunity of the Tribe.** All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the existence and activities of the tribal entity are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in a tribal entity charter shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe or to be a consent of the Tribe to the jurisdiction of the United States or of any state with regard to the business or affairs of the tribal entity or the Tribe or to any cause of action, case or controversy, except as provided herein.

(4) **Credit of the Tribe.** Nothing in a tribal entity charter, nor any activity of any tribal entity, shall implicate or in any way involve the credit of the Tribe.

(5) **Inclusion in Charter.** The provisions of Subsection (1) through (4) of this Section shall be included in the charter of each tribal entity.

Articles Of Incorporation Of Sioux Manufacturing Corporation

* * * * *

Section 4. - Attributes.

4.1 - Governmental Subdivision. The Sioux Manufacturing Corporation is a tribal corporation and a governmental subdivision or subordinate board of the Tribe.

4.2 - Sovereign Immunity and Waiver.

4.2.1 - Sovereign Immunity of the Corporation. The Corporation is clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by these Articles of Incorporation, including sovereign immunity from suit in any state, federal or tribal court. Except as provided in Subsection 4.2.2 below, nothing in these Articles of Incorporation shall be deemed or construed to be a waiver of sovereign immunity of the Corporation from suit, which may only be waived pursuant to Subsection 4.2.3. Except as provided in Subsection 4.2.2 below, nothing in these Articles of Incorporation shall be deemed or construed to be a consent of the Corporation to the jurisdiction of the United States or of any state or of any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation.

4.2.2 - Waiver of Sovereign Immunity of the Corporation-Contracts. Sovereign immunity of the Corporation is hereby expressly waived with respect to any written contract entered into by the Corporation, and the Corporation hereby expressly consents to the jurisdiction of any court which would have jurisdiction but for the sovereign immunity of the Corporation, including courts of the United States or of any state or of any tribe, with regard to any written contract entered into by the Corporation.

4.2.3 - Waiver of Sovereign Immunity of the Corporation-Other. Sovereign immunity of the Corporation with respect to any matter other than a written contract may

be waived only by express resolution of the Board after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the Board of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Corporation. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Corporation subject thereto, court having jurisdiction pursuant thereto and law applicable thereto. Neither the power to sue and be sued provided in Subsection 7.6, nor any express waiver of sovereign immunity by resolution of the Board, shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Corporation other than property specifically pledged or assigned, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

4.2.4 - Sovereign Immunity of the Tribe. All inherent sovereign rights of the Tribe as a federally recognized Indian tribe with respect to the existence and activities of the Corporation are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in these Articles of Incorporation nor any action of the Corporation shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe, or to be a consent of the Tribe to the jurisdiction of the United States or of any state or any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation or the Tribe, or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or a consent to suit in respect of any land within the exterior boundaries of the Reservation, or a consent to the alienation, attachment or encumbrance of any such land.

4.2.5 - Credit of the Tribe. Nothing in these Articles of Incorporation nor any activity of the Corporation shall implicate or in any way involve the credit of the Tribe.

4.3 - Assets of the Corporation. The Corporation shall have only those assets specifically assigned to it by the Council or acquired in its name by the Tribe or by it on its own behalf. No activity of the Corporation nor any indebtedness incurred by it shall implicate or in any way involve any assets of tribal members or the Tribe not assigned in writing to the Corporation.

March 7, 1990

Fort Totten Tribe, Sioux Nation
c/o Robert E. Manning
P.O. Box 400
Fort Totten, ND 58335

Gentlemen:

Medical Supplies & Technologies, Inc., an Illinois corporation ("MST"), hereby submits this Letter of Intent to the Fort Totten Tribe of the Sioux Nation and Sioux Manufacturing Corporation ("Sioux"), to set forth its understanding of the terms of certain proposed transactions by and among MST, John Veleris ("Veleris"), Thomas Klamet ("Klamet") (MST, Veleris and/or Klamet, as appropriate, are referred to as "Seller") and an entity wholly-owned, directly or indirectly, by the Sioux ("Buyer").

Seller and Buyer will produce and market various latex medical products (the "Products") (the production of the Products is referred to as the "Business"), including but not limited to, surgical, specialty and examination gloves, in facilities located on the Sioux Reservation located in Fort Totten, North Dakota. Seller and Buyer will enter into several agreements with each other to perform certain services in relation to the production of the Products. Seller will provide its technology, know-how and expertise in relation to the production and marketing of the Products. Buyer will obtain all government approvals required for these transactions, including any approvals required by the Bureau of Indian Affairs. Buyer will also provide all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business. The details of these proposed transactions will be discussed further by Seller and Buyer and agreed to in good faith and shall be set forth in various contracts and other agreements deemed necessary to implement performance of these transactions. The various contracts shall obligate the Seller and Buyer to

work diligently and in good faith toward completing Phase 5 (as hereinafter defined).

1. *Asset Purchase Agreement.* Seller will sell or cause to be sold to Buyer all of the assets of MST (the "Assets"), tangible and intangible, including but not limited to, Seller's equipment manufacturer contract (and the specifications thereto) with ACC Automation Co., L.P. (the "ACC Contract") for that certain machine (the "Machine") to be used in the production of the Products; computer model manufacturing plans; engineering and equipment specifications; waste and environmental plans; dip form mold specifications; raw materials specifications; marketing and sales plans; architectural and engineering drawings and specifications for the building in which the Products will be produced; organizational plans; financial projection models; management information systems plans; specifications and laboratory tests for the Products; brochures relating to the Products; confidentiality agreements relating to the Products; any trade secrets related to the Products or the Business; and all other assets of MST pursuant to an Asset Purchase Agreement to be entered into by Seller and Buyer (the "Asset Purchase Agreement"). Prior to the execution of the Asset Purchase Agreement, Buyer and Seller will renegotiate the ACC Contract with ACC Automation Co., L.P. on terms mutually agreeable to Buyer and Seller. After the renegotiation of the ACC Contract, Seller will assign all its rights under the ACC Contract to Buyer. All of the Assets to be sold by Seller to Buyer at Closing will be owned by Seller free of any claims of third parties except as disclosed by Seller to Buyer prior to Closing and will be clearly identified and defined in the Asset Purchase Agreement. It is understood by Buyer and Seller that neither party will be required to enter into the Asset Purchase Agreement, or any other agreement contemplated by this Letter of Intent, unless and until all of the conditions to Closing (as defined below) specified in Section 10 of this Letter of Intent are fulfilled though all parties are hereby bound in good faith to attempt to fulfill all such conditions.

2. *Certified Expenses; Manner of Payment.* Buyer shall pay to Seller, pursuant to the Asset Purchase Agreement, the aggregrate amount of those certified expenses of Seller incurred previously (the "Certified Incurred Start-up Expenses"). In addition to these expenses are expenses incurred for legal, accounting and other professional services relating to these transactions (the "Certified Incurred Professional Expenses"). The Certified Incurred Start-up Expenses are estimated to be $645,247 as of the date hereof, and the Certified Incurred Professional Expenses are estimated to be $225,000 as of the date hereof. The Certified Incurred Start-up Expenses and the Certified Incurred Professional Expenses (collectively, the "Certified Expenses") will be agreed to by Seller and Buyer prior to the execution of the Asset Purchase Agreement, but in no event shall exceed $870,000 (the execution of the Asset Purchase Agreement and all other documents necessary to start the Business will be referred to as the "Closing" and the date of the Closing as the "Closing Date"). On the Closing Date, Buyer agrees to pay to Seller, in cash, an amount equal to the Certified Expenses and Buyer and Seller also agree to enter into a Consulting Agreement (as defined below). The Closing shall take place at 9:00 a.m., local time, on April 4, 1990 at the offices of Altheimer & Gray, 10 S. Wacker Drive, Suite 4000, Chicago, Illinois, or at such other place and time as shall be mutually agreeable to Buyer and Seller.

3. *Consulting Agreement.* Seller, on the Closing Date, will enter into an agreement with Buyer whereby Seller will provide consulting services to Buyer for the management and operation of the Business (the "Consulting Agreement"). Seller will supply technical and engineering assistance, market the Products and train certain individuals designated by Buyer in the management and operation of the Business. Seller will also agree to comply with mutually agreed upon standards of performance such as production efficiency rates, scrap material rates and the like. In accordance with Buyer's desire that the Business be operated in a manner which reduces unemployment

among the people of the Fort Totten Tribe of the Sioux Nation while continuing toward optimum profitability, Buyer will implement appropriate guidelines, developed after consultation with Seller, with respect to employee hiring.

Pursuant to the Consulting Agreement, Seller will pay all reasonable and appropriate expenses incurred in the employment of four consultants (the "Production Consultants"). Buyer will reimburse Seller for all certified expenses incurred by Seller in the employment of the Production Consultants ("Certified Consultant Expenses") as follows: Buyer will pay to Seller eight payments of $125,000, one every three months until eight payments are made *unless* those conditions constituting Phase 5 (as defined below) are fulfilled. If Phase 5 is completed prior to the conclusion of the eight three month periods in which Buyer is required to reimburse Seller under this Section 3, only those Certified Consultant Expenses incurred prior to the achievement of Phase 5 will be reimbursed; in no event will Buyer be required to reimburse Seller for any Certified Consultant Expenses incurred after the attaining of Phase 5. The Certified Consultant Expenses will be determined as soon as practicable at the end of every three months in a manner mutually agreeable to Buyer and Seller. Buyer will pay the first $125,000 on the Closing Date. If, for any three month period, the Certified Consultant Expenses are less than $125,000, such excess ("Available Excess") will be held by Seller and applied towards the next reimbursement payments due from Buyer for the Certified Consultant Expenses in excess of $125,000 for any subsequent three month period. If, for any three month period, the Certified Consultant Expenses exceed the sum of $125,000 and the Available Excess (if any), Buyer will further reimburse Seller for such excess expenses up to an amount equal to $12,500 per three month period ("Overage Payment") during which such excess exists. The maximum allowable Overage Payments, if not used, shall be cumulative. In the event Seller incurs Certified Consultant Expenses in any three month

period in excess of the $125,000 reimbursement payment, all of the Available Excess and all accumulated Overage Payments, Seller will be allowed to carry forward such excess Certified Consultant Expenses into the succeeding three month period(s). Buyer's total reimbursement of Seller will not, under any circumstances, exceed the lesser of the Certified Consultant Expenses or $1,100,000. The example attached as Exhibit A shall be used to demonstrate this intent of the parties in applying this paragraph.

4. *Minimum Participation.* In addition to the reimbursement payments, Seller, upon the attaining of Phase 5, has the right to receive from the Buyer the gross sales of the Products, subject to an appropriate adjustment for sales returns ("Gross Sales"), multiplied by 4.00% (the "Minimum Participation Fee") until Termination. The Minimum Participation Fee will be payable at least quarterly to Seller within sixty days (60) after the end of each quarter of the fiscal year of the Business.

5. *Net Profit Percentage Fee.* In addition to the reimbursements by Buyer under Section 3 and the Minimum Participation Fee, the Consulting Agreement will provide that Seller will also be entitled to a percentage of the Net Profits (as defined below) of the Business upon completion of Phase 5 (the "NPP Fee"). The NPP Fee is in addition to, and not in lieu of, all other fees due Seller contemplated by this Letter of Intent until Termination. The NPP Fee will be determined as follows: (a) the Applicable Percentage (as defined below) multiplied by Net Profits (as defined below) minus (b) the Minimum Participation Fee. The NPP Fee will be payable annually within sixty (60) days after the end of the fiscal year of the Business. The Applicable Percentage will be determined as follows (subject to any revision mutually agreed upon by Buyer and Seller): if Phase 5 is completed within 28 months of the conclusion of the renegotiation of the terms of the ACC Contract the Applicable Percentage will be 30%; if Phase 5 is completed in more than 28 months but within 34 months, the Applicable Percentage will be 25%;

and if Phase 5 is completed in more than 34 months but within 40 months, the Applicable Percentage will be 20%. If Phase 5 is not completed within 40 months, the Consulting Agreement may be terminated by the Buyer. For purposes of the Consulting Agreement, Net Profits will equal the difference between Gross Sales and (a) cost of materials; (b) wages (in an amount mutually agreeable to Buyer and Seller); (c) utilities and maintenance; (d) salaries and administration (in an amount mutually agreeable to Buyer and Seller); (e) costs paid to Veleris for consulting under the Consulting Agreement; (f) rent; (g) taxes (it being understood, however, that the amount of taxes imposed by tribal authorities to be deducted from Net Profits will not exceed 1% of gross sales); (h) other operational costs (to be agreed to by Buyer and Seller); (i) $83,334 per year; and (j) the Applicable Percentage of depreciation of equipment calculated on a straight line basis over 30 years. There will be no deduction from Net Profits for debt service expenses (including, but not limited to, any interest payments). In the event the Business has incurred losses for prior years, the NPP Fee shall be reduced by the product of the Applicable Percentage multiplied by the losses of such prior year(s). However, losses incurred prior to the actual commencement of the production of the Products shall not reduce the NPP Fee. Losses for the year in which such production begins shall be prorated beginning with the month in which production begins. In order to facilitate the Closing, Buyer will provide an analysis of manufacturing costs to be incurred.

6. *Retention Amount.* Buyer will retain from the NPP Fee an amount equal to the Applicable Percentage of the NPP Fee (the "Retention Amount").

7. *Termination Fee.* Seller has the right to put (the "Put Right"), and Buyer has the right to call (the "Call Right"), all of Seller's rights to receive the NPP Fee and the Minimum Participation Fee ("Termination") beginning on the day which is six and one half years after the Closing Date. Notice of the exercise of such Termination shall

be given to the other party not less than one year in advance and shall specify a termination date (the "Termination Date"). In the event of Termination, Seller will be entitled to a termination fee determined according to the appropriate formula set forth in *Exhibit B*; the Put Fee is applicable in the event of exercise of a Put Right and the Call Fee is applicable in the event of exercise of a Call Right (the "Termination Fee"). The choice of an independent appraiser, as necessary per the formula in *Exhibit B*, will be mutually agreed upon by Buyer and Seller. Fees of the appraiser shall be paid by Buyer. The Termination Fee will be payable over five years from the Termination Date and will be subject to market interest (such interest rate will be the prime rate announced by a bank mutually agreeable to Buyer and Seller). Upon Termination, Seller will not be entitled to a Minimum Participation Fee or NPP Fee, but will be entitled to a fee (the "Reduced Minimum Participation Fee") equal to 2% of Gross Sales of the Business for each of the three years ending upon the third anniversary of the Termination Date and 1.5% of Gross Sales of the Business for each of the next seven years thereafter. In no event will Gross Sales of the Business subject to the Reduced Minimum Participation Fee exceed, for any year, the average of Gross Sales of the year preceding Termination Date, the year of the Termination Date, and the year following Termination Date.

8. *Exclusivity.* The Seller retains the exclusive rights to serve as consultant to the Business and is entitled to the Minimum Participation Fee and the NPP Fee prior to Termination and to the Reduced Minimum Participation Fee and the Termination Fee thereafter for all latex products and polymer gloves produced by the Business, whenever and however developed, in a manner to be agreed upon by the parties hereto.

9. *Sovereign Immunity.* Buyer and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes.

This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. The Buyer, the Seller and the Tribe agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts. Buyer and the Tribe appoint Mark J. Jacobs to accept service of process in any such dispute. The Buyer, the Seller and the Tribe hereby waive their respective rights to demand a jury trial.

10. *Closing.* The Closing of the transactions contemplated by this Letter of Intent will take place within sixty (60) days following acceptance of this Letter of Intent. The Closing is contingent upon the satisfaction of the following conditions:

(a) Buyer secures a commitment for adequate financing to complete Buyer's obligations as contemplated in this Letter of Intent on terms acceptable to Buyer.

(b) Seller is able to deliver, to Buyer's satisfaction, adequate sales and marketing contracts.

(c) Substantially all distributors and marketing representatives are ready, able and willing to perform their obligations under their contracts with Seller.

(d) Seller and Buyer have successfully renegotiated the ACC Contract and Buyer has secured a letter of credit for ACC agreeable to ACC.

(e) Delivery of appropriate releases or indemnification concerning the previous investor in M.S.T.

11. *Confidentiality.* The parties to this letter reaffirm their Confidentiality Agreement.

12. *Definition of Phase 5.* When used in this Letter of Intent, the term "Phase 5" will mean that period in time in which the Business has fulfilled, based on the mutual, good faith efforts of Buyer and Seller, the following targets:

(a) complete installation of the production line and packaging equipment necessary for the production of the Products;

(b) successful completion of the Production Line Final Acceptance Test (as specified and defined in the ACC Contract);

(c) a product on line speed of 25 ft./min. (18,000 gloves per hour);

(d) an on-line rejection rate of a maximum of 4% (720 gloves per hour);

(e) the Products meeting all FDA specifications;

(f) installation of three shifts (day, evening and night);

(g) completion of a quality assurance program (as per FDA requirements); and

(h) training of labor, supervisors and production management (based on a mutually agreed pre-submitted plan).

13. *Expenses.* If the transactions contemplated herein are consummated, each party hereto (or an entity controlled by or affiliated with any of them) will pay all of its own fees and expenses incurred in connection with the formation of the Business, including all promotional, printing, postage and travel expenses and all expenses of legal counsel and accountants. If the transactions contemplated hereby are not consummated within 60 days from the date hereof or if the Sioux at any time notifies any other party that they are terminating negotiations with respect to the matters described herein, the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees and expenses incurred by Veleris, Klamet or MST (or an entity controlled by or affiliated with any of them) in connection with the negotiation of this Letter of Intent, the negotiation of any agreements or contracts contemplated hereby and the promotion of the Business after the date hereof, including all printing, postage and travel expenses

but before receipt of such notice; provided, however, that if the transactions contemplated hereby are not consummated within 60 days from the date hereof due to actions taken in bad faith by Seller, all reasonable fees and expenses incurred by Buyer shall be paid by Seller.

If you desire to pursue this matter on the terms contained in this Letter of Intent, please so indicate by signing and returning a copy of this Letter of Intent enclosed for that purpose.

Very truly yours,

MEDICAL SUPPLIES AND TECHNOLOGIES, INC.

By: /s/ JOHN VELERIS
President

The above is hereby agreed to and accepted this seventh day of March, 1990.

SIOUX MANUFACTURING CORPORATION

By: /s/ ROBERT MANNING
Title: V.P. & Gen. Mgr.

cc: Thomas Klamet

Exhibit A

"Certified Consultant Expenses" Payment Example

Assumes Payment of $125,000

Period	Cumulative Buyer Payment	Cumulative Seller Certified Costs	Shortage or <Excess> Cost	Buyer Reimbursement Overage Payment	Notes
1	125	100 (100)	25	None	None
2	250	250 (150)	—	None	None
3	375	410 (160)	<35>	35	35 Less than 12.5 X 3
4	535	551 (141)	<16>	15	Limit to Total Overage of Overage Paid or $50 - 35 = 15
5	675	687 (136)	<12>	12	Limit to total overage of 12.5 X 5 Less Prior Overage Amounts paid but never more than shortage or $75 - 50 = 25 but not more than 12

Summary

Summary Total Payments Made by Buyer	$ 675
	+ 12
	687
Total Costs Incurred by Seller	687
Excess	$ 0

Maximum Allowed 125.0 X 5 X 1.1 or $687.5 Not Exceeded

Exhibit B
Put Fee

$$TF = \frac{[(RA - (\$500{,}000 \times Y)) \text{ or } (\$0), \text{ whichever is greater}] + (A)}{2} \times AP$$

Call Fee

$$[(RA - (\$500{,}000 \times Y) \text{ or } (A), \text{ whichever is greater}] \times AP$$

Where:

TF = Termination Fee

RA = Retention Amount

Y = Years of Operation of the Business

A = Appraised Value of the Business

AP = Applicable Percentage

(3)

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

No. 93-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Altheimer & Gray objects to each of the Petitioner's "Questions Presented." Altheimer & Gray submits the following Questions:

A tribal corporate entity entered into a contract with a third party to engage in manufacturing and marketing medical latex products in an existing facility on Indian land. The contract provided that the tribal entity would pay for the third party's attorneys fees if the deal fell through. During the negotiations and in the contract, the tribe and the tribal entity expressly and in writing agreed to waive exhaustion and sovereign immunity and agreed to submit to the jurisdiction of the federal and state courts in Illinois. The tribe and the tribal entity also expressly waived exhaustion and sovereign immunity in the tribe's Law and Order Code and the entity's Charter. In the contract, neither the tribe nor the tribal entity ceded any right, interest or control in Indian land to a non-Indian. The questions presented are as follows:

1. Is the tribal exhaustion rule applicable to this case?

2. Are the tribe's and the tribal entity's waivers of sovereign immunity effective?

3. Is the contract one for services "relative to [Indian] lands" within the meaning of 25 U.S.C. §81?

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No. 93-452

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OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Altheimer & Gray ("Altheimer") respectfully requests this Court to deny Sioux Manufacturing Corporation's petition for writ of certiorari ("Petition").

OPINIONS BELOW

Altheimer agrees with Petitioner Sioux Manufacturing Corporation's ("SMC") citations of the opinions and judgments delivered in the courts below.

JURISDICTION

Altheimer agrees with SMC's statement of the grounds on which the jurisdiction of this Court is involved.

STATUTES AND OTHER LAWS INVOLVED

Altheimer strongly disagrees with SMC's statement that this case involves 28 U.S.C. §1332. Jurisdiction in the District Court was founded on 28 U.S.C. §1332 because the parties are of diverse citizenship. However, the merits of this case do not involve the diversity statute. Moreover, Altheimer strongly disagrees with SMC's argumentative statement that "[t]his case concerns the use of federal diversity jurisdiction under 28 U.S.C. §1332 (1988) to impair Indian tribal sovereignty." SMC Petition for Writ of Certiorari 2 ("Pet."). This statement not only mischaracterizes the issues in the case, but it is inappropriately argumentative.

Altheimer agrees with the remainder of SMC's statement of the statutes and other laws involved, except to point out that SMC inappropriately characterizes 25 U.S.C. §81 as the "protective provisions of 25 U.S.C. §81" (Pet. 2). The statute speaks for itself.

STATEMENT OF THE CASE

A. Nature of the Controversy.

Altheimer objects to numerous misstatements made by SMC in its presentation of the Nature of the Controversy. Altheimer will first present its statement of the Nature of the Controversy, and then will address specifically the misstatements made by SMC.

In this federal diversity breach of contract action, Altheimer seeks recovery of its attorneys' fees from SMC pursuant to an express provision in the contract at issue in this case. The contract, which was a Letter of Intent agreement (hereinafter "Contract"), was between SMC and a third party, Medical Supplies & Technology, Inc., whom Altheimer represented in negotiating the Contract.

The following facts concerning the negotiations and the Contract are undisputed.

The Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe, created Sioux Manufacturing Corporation ("SMC") to manufacture and market camouflage cloth and military helmets. *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 806 (7th Cir. 1983), Pet. App. 2. SMC is a wholly-owned tribal corporation and governmental subdivision of the Sioux, organized under the Tribe's Law and Order Code. *Id.* The corporation's offices and sole manufacturing facility are located inside the boundaries of the Devils Lake Sioux Reservation ("Reservation") in Fort Totten, North Dakota, on land which SMC leases from the Tribe. *Id.*

SMC is a large, sophisticated corporation, with gross sales in 1990 totalling approximately $25 million. Sioux Manufacturing Corporation's Statement of Undisputed Material Facts ¶15, Respondent's Appendix 2 ("Resp. App.").

Seeking to expand their business, the Tribe and SMC negotiated with Medical Supplies & Technology, Inc., an Illinois corporation, to manufacture and market latex medical products at the existing Reservation plant. *Altheimer & Gray*, 983 F.2d at 806, Pet. App. 3. In these negotiations, both sides were represented by Chicago attorneys. Affidavit of Martha Mahan Haines ¶¶2, 4, Exhibit A to Altheimer & Gray's Memorandum in Opposition to SMC's

Motion to Dismiss ("Haines Aff."), Resp. App. 4. The Contract was negotiated in a series of in-person meetings in Chicago, Illinois and in telephone conversations, and was executed in Chicago; representatives of SMC and an attorney for SMC were present at each meeting. Haines Aff. ¶¶3-10, 12, Resp. App. 4-7. During the negotiations, representatives of and the attorney for SMC represented and agreed that federal government approval of the Contract was not necessary, that SMC was amenable to suit in the state or federal courts in Illinois rather than in the tribal court, and that sovereign immunity was not a bar to suit. Haines Aff. ¶11, Resp. App. 5-6. These agreements were included in the Contract. *Id.*

The Contract also provided at paragraph 13 that if the transaction contemplated under the Contract were not consummated within 60 days of the date of execution, the Tribe "shall promptly pay, upon demand, all reasonable legal and accounting fees" incurred by Medical Supplies & Technology, Inc. in connection with the negotiation of the Contract. Pet. App. 64-65. However, when the deal between SMC and Medical Supplies & Technology, Inc. did not go through and Altheimer attempted to enforce the Contract, SMC refused to pay Altheimer's fees. This lawsuit followed.

SMC's presentation of the Nature of the Controversy misstates the facts or omits material facts in the following ways.

SMC states: "This is a diversity suit in which a law firm employed by a third party seeks recovery of its legal fees, in the first instance in the federal court, from an on-reservation corporation wholly owned by an Indian tribe." Pet. 2. While this statement is technically correct, it omits two important facts: first, Altheimer seeks recovery of its fees pursuant to an express contractual pro-

vision, and second, Altheimer brought this action in federal court "in the first instance" because SMC expressly agreed in the Contract to submit to the jurisdiction and venue of federal and state courts in Illinois.

In addition, SMC has seriously mischaracterized the Contract at issue. SMC states that the Contract "provided for the establishment, construction, development, and operation of a manufacturing facility in the Tribe's trust land within the Reservation to reduce tribal unemployment." Pet. 3. This statement strongly implies that the Contract provided for constructing an entirely new manufacturing facility on Indian land; the obvious purpose of the statement is to attempt to tie the Contract to Indian land. In reality, it is undisputed that the manufacturing facility *already existed* on Reservation land. Sioux Manufacturing Corporation's Statement of Undisputed Material Facts ¶5, Resp. App. 2 ("SMC operates only one manufacturing facility which is situated in Fort Totten, on Reservation land held in trust for the Tribe by the United States," citing Affidavit of Carl McKay); *see also Altheimer & Gray*, 983 F.2d at 811, Pet. App. 14 (noting that although the manufacturing operation would be located on the Reservation, "the facility was already in existence, was part of the Tribe's ongoing business, and was wholly owned by the Tribe.").

Moreover, although the Contract calls for "architectural and engineering drawings and specifications for the building in which the Product will be produced," there is no evidence in the record as to the subject matter of such drawings and specifications. SMC implies in its Petition that the drawings and specifications were for a new building, and that is wrong. There is no evidence as to what the drawings were for (they could have been, for example, drawings of equipment), and there is direct evidence, submitted *by SMC* that the facility already existed. *Id.*

In addition, SMC sets out various provisions of the Contract, but it omits paragraph 9, which is crucial to a determination of the issues here, as both the district court and Court of Appeals found. Paragraph 9 of the Contract provides as follows:

> 9. Sovereign Immunity. Buyer [SMC] and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes. This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. The Buyer [SMC], the Seller [Medical Supplies & Technology, Inc.] and the Tribe agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts.

Letter of Intent ¶9, Pet. App. 62-63.

SMC also omits the undisputed facts (which are pointed out above) that the forum selection, waiver of sovereign immunity, waiver of exhaustion, and choice of law provisions set out in paragraph 9 of the Contract were all the subject of negotiations between the parties. Haines Aff. ¶11, Resp. App. 5-6. SMC also omits the fact that SMC represented that approval of the Contract from the Bureau of Indian Affairs was not necessary. *Id.*

B. The Proceedings Below.

Altheimer strongly objects to SMC's statement that the Seventh Circuit "[d]isregard[ed] the plain language of section 81" (Pet. 6) in reaching its holding that the Contract is not covered by 25 U.S.C. §81.

Altheimer also objects to SMC's summary of the Seventh Circuit's ruling on the sovereign immunity issue. SMC

states that the Seventh Circuit "interpreted and applied various tribal ordinances." Pet. 6. As explained in more detail below, the Tribe's Law and Order Code and the SMC Charter so clearly and unambiguously waive sovereign immunity that there is nothing to "interpret."

REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no important questions deserving this Court's review, nor does it present any frequently recurring questions, as evidenced by the fact that SMC has not cited to one decision with facts remotely similar to the facts of this case. Most importantly, there is no conflict between the Seventh Circuit's decision in this case and the decisions of other Circuit Courts of Appeal or of this Court. *See Braxton v. United States*, 111 S. Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991) (a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law). Finally, SMC has misstated both the law and the facts. For these reasons, the petition for writ of certiorari should be denied.

I.

THE HOLDING OF THE SEVENTH CIRCUIT AND THE DISTRICT COURT THAT THE EXHAUSTION RULE IS INAPPLICABLE TO THIS CASE IS CONSISTENT WITH DECISIONS OF THE SUPREME COURT AND OF THE CIRCUIT COURTS OF APPEALS.

In its thorough discussion of the tribal exhaustion issue, the Seventh Circuit carefully analyzed the leading cases and affirmed the district court's ruling that the exhaus-

tion rule is not applicable to this case. *Altheimer & Gray*, 983 F.2d at 812-15, Pet. App. 16-21.[1] The court reasoned, first, that there has been no attack on the tribal court's jurisdiction, there is no case pending in a tribal court, and the dispute principally concerns state and federal law, not tribal law. 983 F.2d at 814, Pet. App. 20. "More importantly," the Seventh Circuit continued, "application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* [*Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)] and *National Farmers* [*Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)]." 983 F.2d at 814-15; Pet. App. 20. The Seventh Circuit explained that in those two leading cases, this Court was concerned with implementing Congress's policy of tribal self-government. 983 F.2d at 815, Pet. App. 20. *Id.* In contrast, the Seventh Circuit found that in this case, "the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum," as evidenced by its express agreement in paragraph 9 of the Contract to submit to the venue and jurisdiction of federal and state courts located in Illinois. *Id.*[2]

Indeed, not only SMC, but also the Tribe itself, expressly selected the federal forum. The Tribal Council, the governing body of the Tribe, enacted the SMC Charter by resolution.[3] In Paragraph 4.2.2 of the Charter, the Tribe and

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[1] A district court's ruling on this issue is subject to the abuse of discretion standard. *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992).

[2] See Letter of Intent ¶9, Pet. App. 62-63, and reproduced above in Statement of the Case.

[3] Devils Lake Sioux Tribe Resolution No. A05-89-191, Resp. App. 8-9. (The Resolution was attached to Articles of Incorporation of the Sioux Manufacturing Corporation, portions of which are reproduced at Pet. App. 53-55.)

SMC expressly waived exhaustion "with regard to any written contract entered into by the Corporation [SMC]." Articles of Incorporation ¶4.2.2, Pet. App. 53. Pursuant to that grant of authority, SMC waived exhaustion in paragraph 9 of the Contract.

Because the Tribe and SMC "actively [sought] the federal forum" (*Altheimer*, 983 F.2d at 815, Pet. App. 20), the Seventh Circuit concluded that "[t]o refuse enforcement of this routine contract provision [the forum selection clause] would be to undercut the Tribe's self-government and self-determination." *Id.* In short, for the reasons explained by the Seventh Circuit, its ruling on exhaustion affirming the district court's ruling is fully consistent with the leading Supreme Court cases.

The Seventh Circuit's decision is also consistent with the decisions of other Circuit Courts of Appeals. SMC essentially argues that the Seventh Circuit addressed the issues before it in the wrong order. SMC says that the Eighth and Ninth Circuits "hold" that the sovereign immunity issue should be addressed before the exhaustion issue (Pet. 10-11), but the cases SMC cites in support say nothing of the sort.

SMC quotes *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) completely out of context. SMC says that *Stock West* held that "because issues surrounding a claim of tribal sovereign immunity would 'require a careful study of the application of tribal laws and tribal court decisions,' a federal diversity court should stay its hand until after the tribal court has an 'opportunity to resolve the question.' " Pet. 11, *citing Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992). What SMC omits is that in *Stock West*, the district court ruled, and the appellate court affirmed, that the district court would

stay its hand and dismiss the suit as a matter of comity, to allow the tribal court to address the issue of whether the tribal court possessed concurrent jurisdiction over the case.[4] Despite this ruling, the district court went on to rule, as an alternative ground for dismissal of the action, that defendant was immune from suit. *Id.* at 920. The Ninth Circuit held that the latter ruling was an abuse of discretion; since the case was being dismissed and would be heard by the tribal court, the district court should not have ruled on the merits of the immunity issue. *Stock West*, 964 F.2d at 920. Thus *Stock West* stands only for the unremarkable proposition that where an action is dismissed as a matter of comity, the court should not proceed to make substantive rulings in the case, but should allow the other tribunal to do so.

Similarly, the Eighth Circuit case cited by SMC, *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1277 n.3 (8th Cir. 1987), does not stand for the proposition cited. In the first place, SMC cites to a supposed "holding" in a footnote, but courts generally do not put their holdings in footnotes. More importantly, the action in *Kishell* was dismissed for lack of subject matter jurisdiction, and it was for that reason that both the district court and appellate court declined to address the immunity question. *Id.* No citation is needed (and the

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[4] In *Stock West*, as in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 485 (1985), there was a substantial question concerning whether the tribal court possessed jurisdiction over the matter. *Stock West*, 964 F.2d at 920, 919 citing *National Farmers*, 471 U.S. at 854-57. In those circumstances, exhaustion was required. In contrast, in this case, as the Seventh Circuit found, there has been no direct attack on a tribal court's jurisdiction and for that reason, among several others, exhaustion was not required. *Altheimer & Gray*, 983 F.2d at 814, Pet. App. 20.

court in *Kishell* cited none) for the proposition that where a federal court lacks subject matter jurisdiction, the court will not address any other issues raised by the parties. *See id.* In short, neither *Stock West* nor *Kishell* is at all analogous to this case. SMC's claim, then, that a conflict exists between those decisions and the Seventh Circuit's decision is meritless.

SMC again misstates the law when it asserts (Pet. 11-12) that the Seventh Circuit erred by addressing the issue of the validity of the contract under 25 U.S.C. §81 (hereinafter "Section 81") prior to addressing exhaustion. No case so holds. In support, SMC cites *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992), which SMC states "held that where federal law does not give the federal court exclusive jurisdiction, the principle of judicial self-restraint regarding activities occurring inside the reservation is so strong that the federal court should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law." Pet. 11-12.

SMC completely mischaracterizes *Plainbull*. In the first place, *Plainbull* had nothing to do with Section 81, thus it can hardly support SMC's contention that a court must address Section 81 in a particular order. In addition, the Ninth Circuit in *Plainbull* said nothing about "judicial self-restraint" or anything else that SMC says the case said. In *Plainbull*, the Ninth Circuit held that the case belonged in tribal court where a tribal member was accused of grazing cattle on tribal land without tribal permission. *Id.* at 728. In those circumstances, the court merely observed that the fact that the government was seeking to enforce a federal law was immaterial. *Id.*

In short, there is simply no case that holds that courts must address the issues of exhaustion, immunity or the validity of a contract under Section 81 in a particular order. Therefore, SMC's assertion that there is a conflict between the Seventh Circuit and other Courts of Appeals is specious.

In addition to the misstatements identified above, SMC makes the following misstatements of both fact and law in its discussion of the exhaustion issue. As for the law, SMC cites and quotes a United States Supreme Court case as establishing "the doctrine of exhaustion of tribal remedies" as "a bright line 'inflexible bar to [the] consideration of the merits' of a dispute." Pet. 8, quoting *Granberry v. Greer*, 481 U.S. 129, 131 & n.4 (1987). To the contrary, *Granberry* was a habeas corpus case that has absolutely no relevance to the issue of exhaustion of tribal remedies in this civil contract dispute.

SMC also misstates the facts. First, SMC says that there is a question as to whether an official of SMC has the power to, and did, waive "the Tribe's adjudicatory authority over an action brought by Altheimer." Pet. 8. It is unclear what official SMC is referring to and to what acts it refers, for neither the official nor the acts are identified by SMC. More importantly, SMC is wrong and misstates the facts when it contends that the Tribe itself did not waive exhaustion. The Law and Order Code allows the Tribe to waive exhaustion of tribal remedies "by the Tribal Council in the same manner as it may waive sovereign immunity." Law and Order Code §2-2-104, Pet. App. 50. Section 2-2-103(3) of the Code allows the Tribal Council to waive immunity by "express resolution of the Tribal Council." Law and Order Code §2-2-103(3), Pet. App. 49. As pointed out above, SMC's Articles of Incorporation were enacted pursuant to resolution of the Tribal Coun-

cil. Pursuant to that grant of authority, SMC waived exhaustion in its Charter (Articles of Incorporation ¶4.2.2, Pet. App. 53) as well as in the Contract. Letter of Intent ¶9, Pet. App. 62-63.

In sum, the Seventh Circuit's ruling that the exhaustion rule is inapplicable to this case is fully consistent with existing caselaw, and SMC's petition for certiorari should be denied.

II.

THE SOVEREIGN IMMUNITY ISSUE PROVIDES NO GROUNDS FOR GRANTING SMC'S PETITION.

SMC's arguments concerning sovereign immunity do not provide a basis for this Court's review for the following reasons: (1) SMC has waived the immunity question; (2) not even SMC claims that the Seventh Circuit's decision creates a conflict; (3) SMC merely claims that the decision below is "erroneous," which is not a basis for certiorari review; and (4) the Seventh Circuit's decision is correct on the merits and is in line with all other federal Courts of Appeals that have addressed the issue. Finally, SMC again misstates the facts and law on this issue.

First, SMC waived the immunity issue by not raising it before the Seventh Circuit in its Petition for Rehearing and Suggestion for Rehearing En Banc.[5] Because the full Seventh Circuit was not given the opportunity to correct the alleged error in its immunity ruling, this Court should find that SMC has waived this issue. *Cf. Dean v.*

[5] In its Petition for Rehearing, SMC briefly referred to sovereign immunity in support of its arguments on exhaustion, but it did not urge the Seventh Circuit's ruling on immunity as a separate ground for rehearing.

Dean, 837 F.2d 1267, 1268 (5th Cir. 1988) (Court of Appeals will not consider claims raised for first time in a petition for rehearing); *Costo v. United States*, 922 F.2d 302 (6th Cir. 1990) (same).

Even if the issue has not been waived, SMC's sovereign immunity argument should be rejected because SMC merely contends that the Seventh Circuit's decision was erroneous. However, the function of certiorari review is not to correct erroneous decisions. *See* United States Supreme Court Rule 10.1; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review, . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). SMC does not even attempt to point to an alleged conflict among the Circuits.[6] Indeed it cannot. As explained below, all courts that have addressed written waivers of sovereign immunity similar to the waiver in this case have found those waivers to be effective.

On the merits, SMC's and the Tribe's waivers of immunity (there are more than one) are written, express, unequivocal and effective. First, in the SMC Charter, the Tribe itself waived SMC's immunity with respect to written contracts. The Tribe's Law and Order Code specifically provides for such waivers. Section 10-4-106(1) of the Law and Order Code provides, in relevant part:

> A tribal entity is clothed by federal law with all of the privileges and immunities of the Tribe, *except as specifically limited by the tribal entity Charter*,

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[6] In a one-sentence, conclusory paragraph, SMC says that the decision below is in conflict with the decisions of this Court and with tribal and federal law, but it never identifies the decisions that are supposedly in conflict with the Seventh Circuit's decision. Pet. 12.

> including sovereign immunity from suit in any state, federal or tribal court.

Law and Order Code, §10-4-106(1) (emphasis added), Pet. App. 51.

Pursuant to the foregoing grant of authority, the Tribe expressly waived SMC's immunity in SMC's Charter. Section 4.2.2 of the Charter provides in relevant part:

> Waiver of Sovereign Immunity of the Corporation—Contracts.
>
> Sovereign immunity of the Corporation is hereby expressly waived with respect to any written contract entered into by the Corporation. . . .

SMC Charter §4.2.2, Pet. App. 53.

All courts that have addressed a tribal ordinance similar to the quoted provision of the SMC Charter have held that the ordinance constituted an effective waiver of sovereign immunity. *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986) (collecting cases); *Snowbird Construction Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). Under these cases, the Tribe has effectively waived SMC's sovereign immunity, as the Seventh Circuit found. *Altheimer*, 983 F.2d at 812, Pet. App. 15.

Moreover, the Letter of Intent provides that "Buyer [SMC] and the Fort Totten Tribe of the Sioux Nation ('Tribe') will waive all sovereign immunity in regards to all contractual disputes." Letter of Intent ¶9, Pet. App. 62-63. SMC has not, and cannot, cite a single case to support the proposition that the clear and unambiguous lan-

guage of the SMC Charter and the Contract do not constitute express waivers.

SMC, in an attempt to create an issue where there is none, misstates both the law and the facts. SMC points to Section 2-2-103 of the Tribal Code to support its position, but that provision *on its face* is inapplicable to this situation. That Section states in pertinent part:

> Waiver of Sovereign Immunity. Sovereign immunity of the Tribe and any elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, *in any action filed in the Tribal Court with respect thereto*, may be waived only by express resolution of the Tribal Council after consultation with its attorneys.

Law and Order Code §2-2-103(3), Pet. App. 49 (emphasis added). That Section by its terms applies to actions "filed in the Tribal Court," which is not the case here. The provision on immunity applicable to this case is found in Title 10 of the Law and Order Code, "Corporations and Tribal Entities." Pet. App. 50. As pointed out above, Section 10-4-106 of that Title provides that a tribal entity Charter may specifically limit sovereign immunity from suit in any state, federal or tribal court (Pet. App. 50), and the Tribe, in the SMC Charter, did just that. SMC Charter §4.2.2, Pet. App. 53.

Finally, SMC misstates the law when it quotes a federal case and suggests that the case held that "third-party beneficiary principles derived from state law can not [*sic*] be used to imply a waiver of immunity. . . ." Pet. 14, citing *Ables v. United States*, 2 Cl. Ct. 494, 499 (1983), *aff'd without op.*, 732 F.2d 166 (Fed. Cir. 1984). *Ables* had absolutely nothing to do with Indian tribes, and SMC's attempt to mislead this Court by suggesting otherwise must be rejected.

In sum, SMC has not even argued that the Seventh Circuit's decision creates a conflict among the Circuits. To the contrary, *all* of the Circuit Courts of Appeals that have addressed the sovereign immunity issue under similar circumstances have found an effective waiver. There is simply no issue for this Court to review. In any event, the issue is waived.

III.

SMC HAS PRESENTED NO GROUNDS FOR REVIEWING THE SEVENTH CIRCUIT'S RULING THAT THE CONTRACT IS NOT SUBJECT TO THE REQUIREMENTS OF 25 U.S.C. §81.

A. Introduction.

SMC argues to this Court that the Contract is covered by 25 U.S.C. §81. Yet no court has ever applied Section 81 on facts analogous to those presented by this case. The Seventh Circuit's opinion is fully consistent with existing caselaw, including *Green v. Menominee Tribe*, 233 U.S. 558 (1914).

SMC essentially makes three arguments concerning the Seventh Circuit's ruling that the Contract is not subject to 25 U.S.C. §81 because it is not a contract for services "relative to [Indian] lands." SMC argues that: (1) the Seventh Circuit's ruling conflicts with *Green v. Menominee Tribe*, 233 U.S. 558 (1914); (2) the Seventh Circuit's ruling violates 25 U.S.C. §81 (in other words, the decision is wrong); and (3) the legislative history of Section 81 does not support the Seventh Circuit's opinion. Even if each of SMC's contentions were correct (which they are not), only the first contention, alleging a conflict, provides a basis for certiorari review. *See* United States Supreme Court Rule 10.1; *Braxton v. United States*, 111 S.Ct. 1854,

1857 (1991). Nevertheless, Altheimer will address each of SMC's arguments.

B. The Seventh Circuit's Decision Is Consistent With Existing Caselaw.

This Court's decision in *Green* is clearly distinguishable from this case because of the intimate relationship of the contract in *Green* to Indian land. At issue in *Green* was an oral agreement between a tribe and an Indian trader for logging supplies used by the Indians for logging on their land. Under the agreement, the trader paid himself for the supplies from proceeds received by him from the sale of the logs. Thus the subject of the contract, logging supplies, was used to exploit a natural resource growing on Indian land. The money to pay for the supplies came from the sale of that natural resource by the trader. In essence, the contract was for the purchase of supplies in exchange for logs from Indian lands. It was thus a contract in which the Indians ceded a right or interest in Indian lands to the trader.

Green is distinguishable for a second reason. The contract in *Green* was invalid under another clause in Section 81, in addition to the "relative to their lands" clause. Section 81 prohibits contracts in consideration of services for Indians relative to "any claims growing out of . . . moneys, . . . under laws or treaties with the United States, . . . or in any way connected with or due from the United States, ..." 25 U.S.C. §81. In *Green*, the United States had granted the Indians permission to cut and sell dead timber on their land; ten percent of the proceeds was to be paid to the tribe. *Green*, 233 U.S. at 564. Thus, the money from the sale of logs belonged to the United States, ten percent of which the government paid to the Indians. Under the contract, the amounts owed for sup-

plies came out of the "first proceeds from the sale of the logs," *i.e.*, from the ten percent due to the Indians. *Id.* at 565. Thus the contract was prohibited because it concerned money "due [to the Indians] from the United States." 25 U.S.C. §81. This second provision of Section 81 is not at issue in this case and thus *Green* is distinguishable on that ground.

In addition, the policy considerations underlying *Green* distinguish it from this case, as noted by the district court in *In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn. 1993) (holding, *inter alia*, that 25 U.S.C. §81 did not apply to the contracts at issue because they were neither service contracts nor "relative to [Indian] lands," *Hall*, 825 F. Supp. at 1431-34, *following Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 812 (7th Cir. 1993)). In *Green*, the defendant tribe had already made payment for the logging equipment and supplies to an "Indian agent," who failed to forward the payment to the plaintiff trader. The court in *Hall* explained that the enacting Congress's concerns about non-Indians taking unfair advantage of Indian tribes in representation before Congress and in some commercial transactions were clearly implicated in *Green*. *Hall*, 825 F. Supp. at 1432 n.9. If the Court had not found the contract to be covered by Section 81, thus invalidating the contract, the Indian tribe would be forced to pay twice for the same goods. *See id.* Clearly, this factual scenario in *Green* is not at all analogous to the facts in this case, and thus the policy considerations underlying *Green* are simply not present here.

SMC's contention that the Contract in this case is like the contract in *Green* because it is inextricably tied to tribal land is wrong. In support, SMC points to the provisions in the Contract calling for architectural and engi-

neering drawings and specifications, and waste and environmental plans. Pet. 18. Yet, as pointed out above in the Nature of the Case section, there is absolutely no evidence in the record concerning the purposes of such drawings and plans. More importantly, and as discussed above, SMC neglects to mention that whatever drawings and plans were contemplated were for a manufacturing facility that was already in existence. *Altheimer & Gray*, 983 F.2d at 811, Pet. App. 14.

Finally, SMC's statement that the Contract "specifically contemplated needing approval from the Bureau of Indian Affairs of the Department of the Interior" (Pet. 18, citing Pet. App. 56) misstates the facts. In the first place, it is undisputed that representatives of SMC and the Tribe represented to the third party, Medical Supplies and Technologies, Inc. and their attorneys, Altheimer & Gray, that BIA approval of the Letter of Intent was *not* necessary. Haines Aff. ¶11, Resp. App. 5-6. Moreover, it is clear from the Contract itself that BIA approval was contemplated for the transactions *to be entered into* in the event the manufacturing venture between the parties was consummated.[7] Finally, this argument is waived because it was

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[7] The Contract provides:

> Seller [Medical Supplies & Technology, Inc.] and Buyer [SMC] will produce and market various latex medical products . . . in facilities located on the Sioux Reservation located in Fort Totten, North Dakota. Seller and Buyer *will enter into several agreements with each other to perform certain services* in relation to the production of the Products. Seller will provide its technology, know-how and expertise . . . . Buyer will obtain all government approvals required for *these transactions*, including any approvals required by the Bureau of Indian Affairs. Buyer will also provide all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business. The details of these *proposed transactions* will be discussed further by Seller and Buyer and agreed to in good faith . . . .

Pet. App. 56 (emphasis added).

never raised before either the district court or the appellate court.

In short, SMC's attempts to tie this Contract to Indian land are unavailing. There is simply no conflict between the Seventh Circuit's decision and this Court's decision in *Green*.[8]

C. The Decision Below Is Correct On The Merits.

In addition to attempting to create a conflict where there is none, SMC argues that the decision below is wrong on the merits. In the first place, this is not a basis for granting certiorari review. In any event, for the reasons fully set forth by the Seventh Circuit, which need not be repeated here, this Contract is not one for services "relative to [Indian] lands" within the meaning of 25 U.S.C. §81. *Altheimer & Gray*, 983 F.2d at 810-12, Pet. App. 11-15. The Seventh Circuit correctly concluded that the Contract is not covered by Section 81 because "the Tribe did not cede any right, interest or control of Indian lands to MST [Medical Supplies & Technology, Inc.]." 983 F.2d at 812, Pet. App. 14.

Moreover, SMC seriously mischaracterizes a leading treatise in an attempt to convince this Court that the Seventh Circuit's opinion is in error. SMC states that from the first days of this nation, federal policy has been to respect the sovereignty of Indian tribes, including tribal property, and that this policy "has been necessary for the survival of the Indian tribes and their way of life." Pet. 14. For these propositions, SMC cites F. Cohen, *Handbook of Federal Indian Law* 509 (1982 ed.) ("Cohen

[8] SMC does not contend that there is a conflict with any other decision.

treatise"). SMC then asserts that "[p]rimary among these protections are the requirements embodied in 25 U.S.C. §81." Pet. 14. However, the cited page of the Cohen treatise says *nothing* about 25 U.S.C. §81 at all. Rather, the cited page and the surrounding text addresses only the federal policy against alienation of Indian property and explains that the justifications offered for that policy were complex and evolved from a means for avoiding war with Indian tribes to the current policy of "cultural preservation." F. Cohen, *Handbook of Federal Indian Law* 508-10.

In addition, SMC fails to inform this Court that the Cohen treatise, far from characterizing Section 81 as an attempt to promote "the survival of the Indian tribes and their way of life" (Pet. 14), in fact characterizes Section 81 as just the opposite. At the page cited by SMC at note 7 of its Petition, the Cohen treatise specifically cites 25 U.S.C. §81 as an example of "extensive government supervisory power over the everyday life of Indians [that] was essentially unchecked" and which was part of "*a systematic attempt to eradicate Indian heritage and tribalism.*" F. Cohen, *Handbook of Federal Indian Law* 143, cited at Pet. 16 n.7 (emphasis added). In short, SMC's attempt to buttress its arguments by citing to the Cohen treatise are misguided, at best, and at worst, a deliberate attempt to mislead this Court concerning the historical background of and policies underlying 25 U.S.C. §81.

D. The Historical Context And Legislative History Support The Seventh Circuit's Decision.

Finally, SMC argues that the legislative history of Section 81 does not support the Seventh Circuit's opinion. In the first place, even if true, this is not a ground for granting certiorari review. In any event, the fact is that there is nothing in the legislative history that directly ad-

dresses the "relative to their lands" provision. Indisputedly, this qualifier means that Section 81 does not apply to *all* contracts between Indian tribes and non-Indians, but only to certain contracts—those for services which are relative to Indian lands.

The historical backdrop of the statute indicates that what Congress was concerned with were contracts that gave non-Indians some measure of control over Indian lands. In *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), which addressed Section 81, the Seventh Circuit considered the longstanding federal policy of regulating transactions *in* Indian land. *Id.* at 618. Colonial legislatures restrained private land *purchases* from Indians and required all *acquisitions* of Indian land to be approved in advance. *Id.*, *citing* F. Cohen, *Handbook of Federal Indian Law* 508 (1982 ed.). After the War of Independence, the government continued this policy of restraining alienation of land "in order to avoid war with the Indian tribes." *Id.* The Seventh Circuit was thus correct in "hold[ing] that Congress intended to continue its policy of regulating all transactions *in Indian land* when it enacted Section 81 in 1872." *Id.* (emphasis added). Following the principles articulated in *Koberstein*, the Seventh Circuit was correct in this case in holding that the Contract is not subject to Section 81 because the Contract does not cede any right, interest or control over Indian lands to non-Indians.

The legislative history of Section 81, though limited, also supports the Seventh Circuit's holding in this case. See Cong. Globe, 41st Cong., 3d Sess. 1483-87. Although the legislative history does not address the phrase "relative to their lands," it is clear that the Congress did not intend that Section 81 cover *all* contracts with Indians. Rather, the purpose of Section 81 was to protect Indian

rights *in* their lands. One of the statute's proponents stated that the purpose was "to see that [the Indians] get their *rights* promptly and fully and in the sense of the highest equities in regard to these three subjects: first, *their lands*; . . . ." *Id.* at 1487 (Sen. Casserly) (emphasis added).[9]

SMC's suggestion that Section 81 applies here because Altheimer & Gray are attorneys is unsupportable. First, Congress was concerned with agreements *between* Indian tribes and attorneys; in this case, Altheimer & Gray were not the Tribe's attorneys. Second, Congress was concerned not with *all* agreements with attorneys for the payment of money for their services, but only with agreements with attorneys and others for services *"relative to* [*Indian*] *lands."* 25 U.S.C. §81 (emphasis added). In this case, there is no connection between the Contract and any rights of the Tribe to the land. The only connection to land at all is that the manufacturing facility happened to be on Indian land. But, as the Seventh Circuit concluded, the Contract could have been performed anywhere and it did not cede any right, interest or even control over the land to a non-Indian.

IV.

A CONTRARY RESULT WILL SIGNIFICANTLY IMPAIR INDIAN ECONOMIC INDEPENDENCE AS WELL AS OPEN THE FEDERAL COURTS TO A BARRAGE OF LAWSUITS.

A decision adopting SMC's limitless interpretation of Section 81 would seriously impair Indian economic inde-

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[9] The other two subjects noted by Senator Casserly were the Indian tribes' treaties with the United States and their annuities from the United States (Cong. Globe, 41st Cong., 3d Sess. 1487), which are not involved in this case.

pendence, "the foundation of a tribe's self-determination." *Altheimer & Gray*, 983 F.2d at 815, Pet. App. 20. Under SMC's expansive interpretation, *every contract* between a tribe and a supplier of goods or services to be used, consumed, or provided on Indian land is subject to the requirements of Section 81. That includes, for example, every contract for the purchase of food, clothes, and other consumer goods by a tribe, and every employment contract with a tribe (including at-will employment contracts) in which services are to be rendered on Indian land. This is the inescapable result of SMC's interpretation, for its interpretation admits of no limitations; any contract having *any* relation to Indian land, no matter how remote, is subject to Section 81. Clearly, this was not the Congressional intent. Just as clearly, if SMC's interpretation is adopted, non-Indians will simply cease to do business with Indian tribes.

An equally undesirable result of SMC's interpretation arises from the following provision of Section 81:

> All contracts or agreements made in violation of this section [Section 81] shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy, and one-half thereof shall be paid to the person suing for the same and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. §81. Under this statute, if a contract required government approval and it was not obtained, it appears that anyone (not necessarily an Indian) may sue to recover

"all money or other thing of value" paid by any Indian or tribe to the other contracting party. *But see In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn 1993) (dismissing action brought under Section 81 for rescission and recovery of monies on grounds of lack of standing). The statute expressly provides for federal jurisdiction, regardless of the amount in controversy. Moreover, there is a real incentive to bring such cases, since the plaintiff, if successful, "shall be paid" one half of any recovery.

Most significantly, neither the statute nor any caselaw provides for a statute of limitations or repose on such actions. Therefore, under SMC's expansive interpretation, not only would countless contracts with Indian tribes be rendered null and void, but also, anyone may sue in federal court to recover whatever the tribe parted with pursuant to those contracts, no matter how long ago the contract was executed. This provision has been invoked in recent years, *United States ex rel. Buxbom v. Naegele Outdoor Advertising Co. of California, Inc.*, 739 F.2d 473 (9th Cir. 1984), although the court ruled in that case against the plaintiff because the contract had been approved retroactively by the Bureau of Indian Affairs. Given the potential rewards to individual plaintiffs, it is not fanciful to predict that thousands of lawsuits will be filed across the country to recover monies under Section 81, should SMC's interpretation prevail in this Court.

The magnitude of claims as to which SMC's interpretation of Section 81 would open the floodgates is difficult to overstate. For example, every order placed by SMC over the years for machinery, spare parts, electricity, stationary, papers and pencils, food for its cafeteria, or toilet paper for its washrooms would be subject to a suit for recoupment in federal court if SMC is correct in its inter-

pretation of Section 81 and governmental approval for those transactions was not obtained.

In this case, the floodgates argument is not far-fetched. Indeed, in a very recent case criticized by SMC (Pet. 21 n.11), numerous individual plaintiffs brought suit under Section 81 to invalidate contracts for goods and services entered into between various Indian tribes and non-Indian merchants and vendors. *In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn. 1993). The contracts were connected to the tribes' operation of casinos and other gaming enterprises. The plaintiffs were not parties to the contracts, and none of the contracting parties challenged the contracts. The plaintiffs sought rescission and refund of all monies paid by the Indian tribes to defendant merchants pursuant to the contracts. *Id.* at 1425. The court noted that under Section 81, the plaintiffs, if successful, would receive one-half of the refunded monies. *Id.*

The court in *Hall* correctly dismissed the action on the merits of plaintiffs' Section 81 claim. (The court also dismissed the action for lack of standing and failure to join indispensable parties.) The court held that the contracts were not covered by Section 81 on the grounds that Section 81 covers only contracts for services, not supplies, and that the contracts were not for services "relative to [Indian] lands." *Id.* at 1430-34, *following Altheimer & Gray*, 983 F.2d 803 (7th Cir. 1993).

Since SMC criticizes the *Hall* decision, its position must be that, first, every single contract entered into by a tribe for goods or services to be used, consumed or rendered on Indian land is subject to Section 81 and, second, *anyone* may bring an action under Section 81 to challenge those contracts. Certainly, non-Indians will not do business with Indian tribes if they can reasonably anticipate that

anyone, not even a party to the contract, may challenge the transaction in court, whether or not the suit is ultimately successful. Businesses enter into contracts to make a profit, not to buy a lawsuit.

In sum, in determining what contracts are "relative to their lands," some line must be drawn. The line affirmed by the Seventh Circuit in this case (previously drawn in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985)) fulfills the Congressional intent, prevents the absurd results set out above, preserves the ability of tribes to do business with non-Indians, and is fully consistent with other decisions. The Seventh Circuit correctly rejected SMC's limitless interpretation of Section 81.

CONCLUSION

For the foregoing reasons, SMC's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 10, 1993

RESPONDENT'S APPENDIX

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[Dated August 19, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY,	)	No. 91 C-3496
	)	Judge
Plaintiffs,	)	Suzanne B. Conlon
vs.	)	
	)	
SIOUX MANUFACTURING CORPORATION,	)	Magistrate
	)	Bernard Weisberg
Defendant.	)	
	)	
	)	
HEALTH CARE SERVICES, LTD., an Illinois corporation, and JOHN VELERIS,	)	No. 91 C-3653
	)	Judge
	)	Suzanne B. Conlon
Plaintiffs,	)	
vs.	)	
	)	Magistrate
SIOUX MANUFACTURING CORPORATION, a tribal corporation,	)	Bernard Weisberg
	)	
	)	
Defendant.	)	
	)	

SIOUX MANUFACTURING CORPORATION'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant, Sioux Manufacturing Corporation (SMC) submits pursuant to general Rule 12 of the Northern District of Illinois, its statement of undisputed material facts as follows:

* * * *

5. SMC operates only one manufacturing facility which is situated in Fort Totten, on Reservation land held in trust for the Tribe by the United States. SMC's corporate offices are located exclusively within the manufacturing facility. Aff. of McKay, ¶5.

* * * *

15. In 1990, SMC's gross sales of items manufactured on the Reservation totalled approximately $25 Million Dollars. Aff. of McKay, ¶7.

* * * *

Dated this 19th day of August, 1991.

Respectfully submitted,

/s/ Robert Vaaler
ROBERT VAALER

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[Dated September 20, 1991]

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY, a partnership, Plaintiff, vs. SIOUX MANUFACTURING CORPORATION, Defendant.	)	No. 91 C 3496 Consolidated with No. 91 C 3653 Judge Suzanne B. Conlon
HEALTH CARE SERVICES, LTD., an Illinois corporation, and JOHN VELERIS, Plaintiffs, vs. SIOUX MANUFACTURING CORPORATION, a tribal corporation, Defendant.	)	Magistrate Judge Bernard Weisberg

AFFIDAVIT OF MARTHA MAHAN HAINES

Martha Mahan Haines, being first duly sworn upon oath, states as follows:

1. I have personal knowledge of the facts contained in this affidavit and could competently testify thereto if called as a witness.

2. I am, and at all relevant times have been, an attorney licensed to practice law in the State of Illinois and a partner in the law firm of Altheimer & Gray. I was the lead attorney for Medical Supplies and Technology, Inc. (an Illinois corporation) and its two principals, John Veleris (an Illinois resident) and Thomas Klamet (an Ohio resident), in connection with the negotiations and agreement with Sioux Manufacturing Corporation ("SMC") which are the subject of this action.

3. The March 7 letter agreement, a copy of which is attached to the Complaint filed by Altheimer & Gray in this case, was negotiated among the parties in a series of meetings in January, February and March, 1990, all of which took place in Chicago, Illinois, and in telephone calls between the attorneys for both parties. Representatives of each party were present at the negotiations, along with counsel for each party.

4. Mark Jacobs, an attorney practicing in the State of Illinois, represented SMC at every one of the negotiating sessions.

5. The parties met to conduct their initial negotiations on January 4, 1990 in Chicago, Illinois. John Veleris, James Carroll, a partner in the law [sic] of Altheimer & Gray, and I were present at those negotiations. Robert Manning, the vice president and general manager of SMC, and Mark Jacobs participated in the negotiations on behalf of SMC.

6. On February 3, 1990, all of the above-named persons present at the January negotiations met again in Chicago, Illinois and continued their negotiations.

7. On February 14, 1990, the parties and their representatives met again in Chicago, Illinois to further negotiate an agreement between them.

8. On February 16, 1990, representatives of and attorneys for the parties met again in Chicago, Illinois and conducted further negotiations.

9. On February 28, 1990, I met with Carroll and Jacobs to continue negotiations on the terms of the parties' proposed letter agreement.

10. On March 7, 1990, Veleris, Carroll and I met with Manning, Jacobs, Terry Johnson, the Treasurer and Controller of SMC, and Carl McKay, the President and Board Chairman of SMC and Chairman of the Devil's Lake Sioux Tribal Council. The negotiations on March 7, 1990 culminated in the execution on that date of the letter agreement which is the subject of this case, a copy of which is attached as Exhibit A to Altheimer & Gray's Complaint. That agreement, as executed, incorporates language jointly drafted by both parties and their counsel.

11. Among the subjects discussed at the negotiations was the amenability of SMC to suit with regard to this matter should the need arise. The following were discussed with respect to that subject:

> (a) The participants in the negotiations discussed the fact that, should they eventually succeed in negotiating a business arrangement along the lines discussed in the March 7 letter agreement, federal government approval of the contract or contracts reflecting that agreement might be required. They therefore agreed that SMC would seek such approval, and language to that effect was included in the March 7 letter agreement. Mark Jacobs, counsel for SMC, stated, however, that no such approval was necessary for the March 7 letter agreement, and no one present disagreed with that statement.

(b) The participants in the negotiations discussed the fact that, should a suit against SMC be necessary either under the March 7 letter agreement or under any subsequent agreement, the parties bringing the suit would be unwilling to pursue the matter in the Tribal Court of the Devil's Lake Sioux Tribe. Robert Manning, one of SMC's representatives, said that SMC understood the need for it to submit to suit in Illinois, and stated that SMC was in fact amenable to suit in Illinois. No one present disagreed with that statement, including SMC's counsel. SMC agreed that any suit against it under the March 7 letter agreement or any subsequent agreements could proceed in the state or federal courts in Illinois rather than in the Tribal Court, and that Illinois law would be applicable. Language to that effect was therefore included in Paragraph 9 of the March 7 letter agreement.

(c) The participants in the negotiations discussed the fact that a waiver of SMC's sovereign immunity might be necessary to permit any suit to enforce both the March 7 letter agreement and any subsequent agreements. The representatives of SMC said that SMC was in fact amenable to suit under the agreements. No one present, including SMC's counsel, disagreed. SMC agreed to reiterate in the March 7 letter agreement the waiver of sovereign immunity for suits under the March 7 letter agreement and any subsequent agreements, and language to that effect was therefore included in Paragraph 9 of the March 7 letter agreement.

12. Both signatures on the March 7 letter agreement were placed thereon in my presence in Altheimer & Gray's conference room at 10 South Wacker Drive in Chi-

cago, Illinois, on March 7, 1990. John Veleris signed for Medical Supplies and Technologies, Inc. and Robert Manning signed for SMC. I personally observed both men place their signatures on the document; Carl McKay had left and was not present when the document was signed.

* * * *

/s/ Martha Mahan Haines
MARTHA MAHAN HAINES

SUBSCRIBED and SWORN to
before me this 20th day of
September, 1991.

/s/ Gail Ann Keis
Notary Public
My commission expires 10-4-92

DEVILS LAKE SIOUX TRIBE
Resolution No. A05-89-191

WHEREAS, the Devils Lake Sioux Tribe of Indians is a federally recognized Indian Tribe acting under a revised Constitution, dated May 5, 1960, approved by the Acting Commissioner, Bureau of Indian Affairs, July 14, 1961, and as subsequently amended; and

WHEREAS, the Devils Lake Sioux Manufacturing Corporation ("DLSMC") is a corporate entity chartered under the laws of the State of North Dakota and owned 51% by the Tribe and 49% by the Brunswick Corporation; and

WHEREAS, DLSMC is an Indian manufacturing entity with its sole office on the Reservation and is the chief source of tribal income and employment; and

WHEREAS, extended negotiations between the Tribe and Brunswick have resulted in an agreement whereby the Tribe will reorganize DLSMC as a 100% tribally-owned and tribally-chartered corporation through a loan to DLSMC from the State Street Bank of Boston;

NOW THEREFORE BE IT RESOLVED, that the Tribal Council hereby adopts the Articles of Incorporation of the Sioux Manufacturing Corporation dated September 15, 1989, as attached to this Resolution.

BE IT FURTHER RESOLVED that the Tribal Council shall have the authority to pledge the share of stock issued by the Corporation pursuant to Subsection 7.18 as security for a loan to the Corporation.

CERTIFICATION

I, the undersigned, as Secretary-Treasurer of the Devils Lake Sioux Tribal Council, do hereby certify that the Tribal Council is composed of six members of whom six were present, consisting of a quorum for a Special Meeting, which was duly called and convened this 18th day of September, 1989, and approved this Resolution A05-89-191 by an affirmative vote of 3 in favor, 0 opposing, 1 absent.

(The Secretary-Treasurer does not vote and the Chairman votes only in case of ties.)

/s/ Ardis J. Shaw
Ardis J. Shaw, Secretary-Treasurer

/s/ Carl R. McKay
Carl R. McKay, Tribal Chairman

NOV 10 1993

No. 93-452

In the

Supreme Court of the United States

October Term, 1993

SIOUX MANUFACTURING CORPORATION,
Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE UNITED STATES OF AMERICA EX REL. GLENN A. HALL, MICHAEL A. MAPES, AND FRED TRIBBLE IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

No. 93-452

IN THE

Supreme Court of the United States

October Term, 1993

Sioux Manufacturing Corporation,

Petitioner,

v.

Altheimer & Gray, a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble respectfully move this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the Petitioner herein has been obtained, but the attorney for the Respondent herein refused to consent to the filing of a brief by United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble as *amicus curiae*.

The Applicants, United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble, have an interest in this case in that they have now pending in the Court of Appeals for the Eighth Circuit an appeal of a decision of the United States District Court for the District of Minnesota in fifty-seven consolidated cases, styled as United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble against various defendants, No. 93-2903 MNST (the "Eighth Circuit Cases"). One of the questions involved in the Eighth Circuit Cases is the same as that presented for decision in the instant case, that is, the correct application and scope of 25 U.S.C. § 81, specifically as it relates to the "relative to [Indian] lands" portion of that statute. The Applicants also now have pending in the Court of Appeals for the Seventh Circuit an appeal of a decision of the United States District Court for the Western District of Wisconsin in seven consolidated cases styled as United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble against Indian Country Leasing Company and Interstate Gaming Services, Incorporated, Nos. 93-3361 through 93-3367. These cases also involve 25 U.S.C. § 81.

Questions involving the application and scope of 25 U.S.C. § 81 are critically important to the proper management of Indian gaming, which is taking place on Indian reservations in the United States on a widespread basis, and, consequently, critically important to the welfare of the individual members of the Indian tribes on these reservations. Without a correct

application of Section 81 to the arrangements being entered into between outside suppliers of goods and services to the various Indian tribes for use in gaming activities on these reservations, unconscionable contracts will continue to be made with these tribes, and money which should properly belong to the individual members of the tribes and used for the benefit of all tribal members, will instead continue to be diverted to third parties, sometimes for use in creating gaming operations directly in competition with those of Indians on the reservations. At this juncture in the history of the development of Indian gaming on Indian reservations, it is critically imperative that this Court take swift and affirmative action to enforce the congressional mandate set forth in 25 U.S.C. § 81 to protect Indians from these unconscionable contracts. The enforcement of this mandate is at least as important today as it was when this statute and related statutes were originally enacted by Congress, and the Federal policies which gave rise to the legislation have been continuously reaffirmed by Congress as it has revisited Title 25 through the intervening years.

The Petition for Writ of Certiorari of the Petitioner herein argues that the Letter of Intent in the instant case was one which was "relative to" Indian land and hence was governed by the provisions of 25 U.S.C. § 81. However, the discussion therein of this point is inadequate since the contract or Letter of Intent was not one involving arrangements to provide gambling devices to an Indian tribe on a reservation. Applicants have no reason to believe that the argument on this point will be expanded and made complete in this Court relative to the critically important issue of the application of Section 81 to these other types of transactions, which are also "relative to" Indian land and which this Court should be cognizant of in making any decisions on the scope of Section 81 in the instant case. Accordingly, and because there are a variety of other related issues which will be coming before this

Court in the future (including a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, pursuant to Rule 11 of the Supreme Court Rules, which Applicants herein plan to file in the near future), this Court should grant the Applicants' request for leave to file the accompanying brief in this case as *amicus curiae* relative to the appropriate scope and application of 25 U.S.C. § 81.

Dated: November 10, 1993.

COUREY, ALBERS, GILBERT
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By

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INTEREST OF THE UNITED STATES OF AMERICA EX REL. GLENN A. HALL, MICHAEL A. MAPES, AND FRED TRIBBLE

Glenn A. Hall, Michael A. Mapes, and Fred Tribble are individuals who have brought suit in the United States District Courts for the Districts of Minnesota and Western Wisconsin in the name of the United States of America against various individuals and entities under the citizen's suit provisions of United States Code Title 25, Sections 201 and 81, by reason of the defendants' violations of Sections 81 (the "Indian Contract Law"), 261-264 (the "Indian Trader's Act"), and 2701 et. seq. (the "Indian Gaming Regulatory Act" or "IGRA"). All of said defendants have entered into arrangements with Indian Tribes pursuant to which defendants agreed to lease or sell gambling devices for use on various Indian reservations in Minnesota and Wisconsin and to provide varying other services in connection therewith and were paid money therefor by the tribes without having fulfilled the requirements of 25 U.S.C. § 81 or § 264.

Fifty-seven of these cases, venued in the District of Minnesota, are now on appeal as a consolidated appeal to the Eighth Circuit Court of Appeals, No. 93-2903 MNST. One of the issues present in that consolidated appeal is also present in the instant case, namely the proper scope and application of 25 U.S.C. § 81. Seven of these cases, venued in the Western District of Wisconsin, are now on appeal as a consolidated appeal to the Seventh Circuit Court of Appeals, Nos. 93-3361 through 93-3367. Those cases also involve 25 U.S.C. § 81.

Accordingly, Glenn A. Hall, Michael A. Mapes, and Fred Tribble, in the name of the United States of America, have a vital interest in seeking review of the Seventh Circuit's decision in the instant case. That decision, if left undisturbed,

could improperly restrict the application of Section 81 to "land transactions" rather than to transactions "relative" to Indian lands, in direct contradiction to the express language of Section 81, Congressional intent, and the prior interpretations of Section 81 by this Court.

The real and primary battleground for the scope and application of Section 81 today is in the area of Indian gaming. Hall, Mapes, and Tribble, as relator plaintiffs with multiple cases currently on appeal to two different circuits relative to the application of Section 81 to Indian gaming cases, are therefore in a unique position to make a significant contribution to this Court's consideration of Section 81. Neither party in the instant case has an interest in informing the Court of the significant and far reaching impact any decision of this Court relative to Section 81 will have on Indian gaming in the United States and the ability of individual Indians to receive the benefits they should be receiving from such activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the very founding of the United States of America Congress has recognized the special fiduciary relationship between the United States Government and Indians. This fiduciary relationship was initially established by the Trade and Intercourse Act of 1790. In 1871, this fiduciary relationship was further expressed and implemented through the enactment of the predecessor to today's Section 81. Section 81 curtails the contractual powers of Indian tribes by requiring that any contract or agreement made by any person with any tribe in consideration for services for Indians relative to their lands must be in writing and approved by the United States Government. If the dictates of Section 81 are not followed,

then all money paid to any such person by any Indian or tribe can be recovered. The writing and approval requirements of Section 81 were enacted to protect Indian tribes from unconscionable or improvident agreements, thus fulfilling the United States Government's general trust duty to act in the best interests of Indians.

Such protection is all the more critical to implement today, as Indian gaming proliferates on Indian lands throughout the United States. Due to the very nature of the gaming industry, and particularly the large amounts of profits available, there is great potential for greed and overreaching on the part of those dealing with Indians. There is also great potential for the use of Indian gaming revenues to better the lives of those on the reservations. As a result, gaming arrangements between Indian tribes and others are obviously ones in which Indians are particularly vulnerable. Such being the case, they are also the types of arrangements to which Section 81 should and must be applied vigorously by the courts.

The legislative history of Section 81, the prior pronouncements of this Court and other courts relative to Section 81, the interpretation of Section 81 by the administrative agencies designated to implement it, and rules of statutory construction specially applicable to Indian lands all clearly indicate that Section 81 must be interpreted and applied broadly to meet the Congressional policy of protecting Indian tribes from unconscionable and improvident agreements. Its scope and application cannot be limited by attempting to limit the meaning of the "services" or the "relative to [Indian] lands" language of the statute.

The Seventh Circuit's interpretation of Section 81 as designed merely to protect Indian tribes in "land transactions" improperly and unnecessarily eviscerates Section 81 at a time

when it is vitally needed to protect Indians from unconscionable and improvident contracts relating to gaming activities.

ARGUMENT

A. Congress Originally Intended a Broad Application of 25 U.S.C. § 81.

From the very inception of our nation's history, the U.S. Congress has recognized the special fiduciary relationship existing between the United States Government and Indians. This relationship was first recognized in the Trade and Intercourse Act of 1790, 1 Stat. 137, now covered by Title 25, United States Code. See, e.g., *United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973). Subsequently, in 1871, Congressional policy recognizing this fiduciary relationship saw further expression in the enactment of the predecessor to 25 U.S.C. § 81, the Act of March 3, 1871, 16 Stat. 570. This statute was amended by the Act of May 21, 1872, 17 Stat. 136, and later by Revised Statutes sections 2103 to 2106.

Section 81 has the effect of curtailing the contractual powers of Indian tribes, since approval and execution by both the Secretary of the Interior and the Commissioner of Indian Affairs (now the Assistant Secretary-Indian Affairs since 1977 [See 42 Fed. Reg. 53, 682 (1977)]) is required.

This case involves the determination of the appropriate scope and application of United States Code Title 25, Section 81, which provides, in part:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment . . . of any money . . . or for the granting or

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

Pgs. 5 & 6

> Mr. Cole. I think it does.
>
> Mr. Harlan. It would prevent such contracts being made by them unless approved by the Secretary of the Interior in any matter relating to the land. . . .

Id. at 1486.

There can be no question but that Congress in passing the predecessor to 25 U.S.C. Section 81 intended to protect Indians and Indian tribes in their commercial dealings with non-Indians. The debate leading up to the passage of the legislation shows that the legislators were also aware of the very broad scope of the legislation that was being enacted and that the intent of Congress in passing the predecessor of Section 81 was to have it apply to <u>all</u> contracts and agreements which related to Indian land, not merely "land transactions".

This Congressional intent has not wavered over the years. For example, in 1958 Congress amended 25 U.S.C. § 81 to eliminate the requirement that all contracts with Indian tribes relating to their lands be executed by a judge of record. It is clear from the House Report on the proposed amendment and the report from the Department of the Interior set forth therein that Congress was aware that Section 81 was being applied not only to contracts between Indian tribes and attorneys, but to contracts between Indians and businessmen as well. *H.R. Rep. No. 2449, 85th Cong. 3d. Sess. 1 (1958) [U.S. Cong. & Code 3961].* It is equally clear that the Department of the Interior interpreted Section 81 as requiring ". . . *all* contracts with Indian tribes relating to their lands. . . to be approved by

the Secretary of the Interior and the Commissioner of Indian Affairs." *Id.* at 3961 (emphasis added). Congress had in 1958 the perfect opportunity to amend Section 81 to limit the broad manner in which it was being applied by the Department of Interior. The only change that Congress made in Section 81, however, was to eliminate the need for court approval.

Again, in 1988, when Congress passed the Indian Gaming Regulatory Act ("IGRA"), it had another opportunity to amend Section 81, but declined to do so. Recently, in connection with the publishing of its final rules, the National Indian Gaming Commission, created by IGRA, commented: "section 81 remains in full force and effect, including the citizen suit provision. The IGRA contains no express repeal of section 81." 58 Fed. Reg. 5802, 5818 (1993).

Thus, Congress' intent that Section 81 be interpreted broadly has remained consistent from the enactment of Section 81's predecessor statute to the present day. It is the duty of the courts to carry out this intent.

B. Public Policy Mandates That the Original Congressional Intent of Broad Application of Section 81 Continue.

The protections afforded Indians and Indian tribes by Section 81 are perhaps needed even more today than when Section 81's predecessor statutes were first enacted. The nature and extent of the present day exploitation of Indians and Indian tribes in their contractual dealings was recently illustrated by the results of a United States Department of Interior survey of the implementation of the Indian Gaming Regulatory Act. This survey was ordered "because allegations concerning contracts for gaming services indicated that

excessive revenues were being realized by operating companies at the expense of the tribes and that other improprieties in certain gaming operations on Indian land also existed."[1] The results of the audit performed by the Inspector General support the allegations which prompted the survey and are contained in his Survey Report: *Implementation of the Indian Gaming Regulatory Act*, Report No. 93-I-349, December, 1992 (the "Report").[2]

In the Report itself, the Inspector General stated:

> . . . some gaming establishments are operating in direct violation of the Act, and Indian tribes may be losing significant income because of fraud or abuse in an industry that is generating revenues of approximately $2 billion a year on Indian lands.

Report at p. 1-2. In reporting the results of his survey, the Inspector General states:

> Approximately 260 gambling operations . . . have been established on Indian lands with minimal or no effective oversight from Federal or state governments. As a result, substantial amounts of gaming revenues that should have been realized by the tribes are instead being siphoned off by

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[1]Memorandum from the Inspector General, United States Department of Interior to Secretary, United States Department of Interior (Dec. 31, 1992).

[2]Memorandum Survey Report from the Assistant Inspector General for Audits, Office of Inspector General, United States Department of Interior to the Assistant Secretary for Indian Affairs and the Chairman, National Indian Gaming Commission, concerning the final survey report on implementation of the Indian Gaming Regulatory Act, Report No. 93-I-349.

> enterprises hired to manage and equip the gaming operations.

* * *

Continuing, the Inspector General reported:

> With little or no Federal guidance and oversight, many of the tribes were in a disadvantageous position when negotiating with companies that were hired by the tribes to manage gaming operations. This resulted in these companies' often taking advantage of the tribes by entering into inequitable agreements and contracts.

Report at p. 10.

Gaming, being a *malum in se* activity, has always been highly regulated and has not been permitted absent explicit statutory authority such as the IGRA. Due to the very nature of the gaming industry, and particularly the large amounts of profits available, there is great potential for greed and overreaching on the part of those dealing with Indians. There is also great potential for the use of Indian gaming revenues to better the lives of those on the reservations. As a result, gaming arrangements between Indian tribes and others are obviously ones in which Indians are particularly vulnerable. Protection of Indians from inequitable agreements and contract was, of course, the driving purpose behind the enactment of the predecessor to today's Section 81. From the above Report of the Inspector General, it is obvious that the vulnerability of Indians and Indian tribes in the area of gaming is being exploited on a significant scale and the large profits being generated are not benefitting Indians and tribes as much as they should. As a result, present day public policy

mandates that the broad scope of Section 81 originally intended by Congress be upheld by today's courts in order to protect Indians and Indian tribes in contracts relating to Indian gaming, thus fulfilling the United States Government's fiduciary obligations to Indians.

C. Case Law Interpreting Section 81 Has Upheld the Broad Application of the Statute as Originally Intended by Congress.

At the time Section 81 was originally enacted, Congress was confronted with specific abuses being visited upon the Indians by unscrupulous attorneys and Indian agents. A review of the subsequent case law interpreting Section 81 and its predecessors reveals that, in accordance with original Congressional intent of broad scope and application, the law has been applied not only to contracts Indians have entered into with attorneys and Indian agents, but to contracts with persons other than attorneys and Indian agents as well. It has also been applied to contracts for goods as well as to contracts involving services.

In re Sanborn, 148 U.S. 222 (1893), which dealt with a contract between an Indian tribe and an attorney, recognized the general trust duty imposed upon the Secretary of Interior and stated that the purpose of Section 81 is to protect Indian tribes from "unconscionable and improvident agreements." *Id.* at 227.

One of the first cases to apply Section 81 in a context not involving an attorney or an Indian agent was *Green v. Menominee Tribe*, 233 U.S. 558 (1914). Green was a licensed trader who had an oral contract to provide supplies and equipment to be used by the Menominee Tribe to harvest timber growing on tribal land. When Green did not receive

payment for the supplies and equipment he had provided, he sued the Tribe to recover the money he claimed was owed to him. This Court cited to the provisions of Section 2103 (predecessor of 25 U.S.C. § 81), which required all agreements with Indian tribes to be in writing, to be executed before a judge, and to bear the approval of the Secretary of Interior and the Commissioner of Indian Affairs. This Court then noted that agreements made in violation of Section 2103 are null and void, and affirmed the judgment of the Court of Claims which had dismissed Green's claims. This Court in *Green* clearly approved of the application of Section 81's predecessor to contracts for the sale of "supplies and equipment", thus affirming that the term "services" in Section 81 includes the service of provision of goods. Thus, violators of Section 81 cannot hide behind a narrow and restrictive meaning of the term in a manner contrary to Congressional intent.

A more recent decision which confirms the applicability of Section 81 to any contracts relating to Indian land is *Montana Bank of Circle, N.A. vs. United States*, 7 Cl. Ct. 601 (1985). The Bank of Circle had loaned money to the Fort Belnap Indian Community. When the Indians did not repay the loan, the Bank of Circle sued the United States, alleging a breach by the United States of the fiduciary duty established by 25 U.S.C. § 81. While the Claims Court recognized the general trust relationship that exists between the United States and the Indians, and that Section 81 is to be construed in light of that relationship, it refused to find that Section 81 would support a right of recovery against the government for a breach of that relationship. The court did conclude, however, that: "Section 81 requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for *any contract* made by any person with any tribe of Indians, or with individual

Indians." *Id.* at 612. (emphasis added).

In a number of recent cases, Section 81 has been applied to transactions between casino managers and Indian Tribes. In *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613 (1985), the court, after citing to the precedent established by *In re Sanborn* and *Green*, applied the provisions of Section 81 to an agreement between a management company and the Wisconsin Winnebago Tribe. The *Koberstein* court said it must be guided by the rule enunciated by this Court which requires that Indian statutes must be given "a sweep as broad as their language". 762 F.2d at 617 [quoting *Central Machinery Co. v. Arizona State Tax Com'n*, 448 U.S. 160, 166 (1980)]. And, while the specific question confronted by the *Koberstein* Court involved a management company, the Court's holding articulated a much broader application of Section 81 by stating "... we hold that Section 81 governs transactions relative to Indian land for which Congress has not passed a specific statute." 762 F.2d at 619. The *Koberstein* decision not only broadly interpreted Section 81, as is required when construing legislation pertaining to Indian tribes[3], but construed Section 81 consistent with *In re Sanborn* and *Green*.

The court in *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company, et al.*, 616 F.Supp. 1200 (Minn. 1985), determined that a bingo management agreement was relative to Indian land, and described the interaction between the state law that generally prohibited gambling and tribal land as follows:

> The court next must turn to whether the bingo management agreements are

[3]See also, Argument in Section E, *infra*.

> "agreement[s] . . . relative to [Indian] land." A careful review of the management agreements shows them to be inextricably tied up in the property rights flowing from the establishment of the bingo operations on tribal trust lands. The very existence of the bingo operations arises from the Indian tribe's sovereignty over tribal trust lands which makes state gaming laws inapplicable to games on reservations. (citations omitted) This is the very reason why bingo can be profitably offered by the Community [Indian tribe]. *But for its land*, state law would not permit it.

Id. at 1218 (emphasis added).

Even the Seventh Circuit in the instant case has noted that:

> Congress has neither implicitly nor explicitly overruled section 81 and the statute continues to "govern[ ] transactions relative to Indian land for which Congress has not passed a specific statute." (citation omitted).

Altheimer & Gray v. Sioux Manufacturing Corporation, 983 F.2d 803 (7th Cir. 1993). *Altheimer* drew a distinction between the type of contract at issue in the instant case (a contract between a tribe and a manufacturer of latex medical products) and the type of contract at issue in *Pan Am* (a contract between a tribe and the managers of a gaming facility). In recognizing the difference, the *Altheimer* court

noted that, unlike gaming facilities, which depend for their operation on exemption from state civil laws by locating on a reservation, manufacturers of latex medical products need not locate on reservation lands in order to operate. *Id.* at 812.

Nonetheless, the District Court in the Eighth Circuit Cases in which Glenn A. Hall, Michael A. Mapes, and Fred Tribble are involved cited *Altheimer* in concluding that the arrangements for the sale or lease of gambling devices to the various tribes in question were not relative to Indian lands. *United States of America ex rel. Hall*, 1993 WL 246402 (D. Minn. May 27, 1993). Obviously, the very nature of arrangements to provide gambling devices are wholly dependant upon Indian land and could not exist outside of the reservation. That is, the gambling activities of the tribes must seek refuge from state civil laws by locating on the reservations. If it was not for the special status enjoyed by the Indian land, the tribes could not operate gambling casinos, nor could the defendants in the Eighth Circuit Cases sell or lease gambling devices to Indian tribes. Arrangements to sell or lease gambling devices clearly, therefore, must relate to Indian land within the scope and application of Section 81.

All of the prior decisions of this Court, as well as decisions of other lower courts, have upheld the broad application of Section 81 as originally intended by Congress. Any attempt to limit the scope and application of this Statute, as the Seventh Circuit has attempted to do, must be struck down, especially given the urgent need for a sweeping application of the statute today in the context of Indian gaming.

D. Administrative Interpretation of Section 81 Has Upheld the Broad Application of the Statute as Originally Intended by Congress.

Legislation is implemented by administrative agencies. Great weight attaches, therefore, to the interpretations and applications adopted by agencies charged with the administration of the legislation in question.[4]

The Department of Interior administers legislation relating to Indian tribes such as Section 81. One source of Interior Department policy can be found in the seminal work on Indian law, Felix S. Cohen's *Handbook of Federal Indian Law* (1982 ed.). In 1968 Congress directed the Secretary of Interior to have the *Handbook* revised and republished. *See Handbook* at ix. The 1982 edition of the *Handbook* is the result of that directive. Because of the Department's interest in the *Handbook*, the statements contained therein are a strong indication of Department of Interior policy. The *Handbook* describes 25 U.S.C. § 81 as prohibiting contracts between Indians and non-Indians unless approved.[5] It does not limit the application of Section 81 to land transactions.

Another indication of Department policy can be found in the House Report concerning the 1958 amendment to 25 U.S.C. § 81. It is clear from the House Report and the report from the Department of the Interior set forth therein, approving the proposed amendment, that the Department of the Interior interpreted Section 81 as requiring ". . . *all* contracts with Indian tribes relating to their lands . . . to be approved by the Secretary of the Interior and the

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[4]Norman J. Singer, *Sutherland Statutory Construction*, § 49.05 (Sands, 5th ed. 1992)

[5]*Id.*, Cohen at 318, n. 293.

Commissioner of Indian Affairs." *H.R. Rep. No. 2449, 85th Cong. 3d Sess. 1 (1958). [U.S. Cong. & Code 3961]* (emphasis added).

Most significantly, however, the Department of Interior, acting through the Assistant Secretary of Interior-Indian Affairs, recently issued a Memorandum to all Area Directors containing guidelines which the Area Directors are required to fully comply with in reviewing and approving all contracts, leases, subcontracts, assignments or agreements submitted after March 6, 1992, related to Indian gaming. The guidelines explicitly set forth the Department's interpretation and application of Section 81 to the effect that all contracts involving gambling equipment are relative to Indian lands. For example, among the types of contracts subject to Section 81 review and approval under these guidelines are "equipment lease" (Part C, subparagraph 13), "contract for lease or purchase of gaming equipment" (Part C, subparagraph 14), and "lease or agreement for gaming equipment" (Part C, subparagraphs 15 and 16). See *BIA Guidelines to Govern the Review and Approval of Gaming Contracts and Other Gaming Activities* (March 5, 1992) (the "Brown Guidelines")(App. ___).

E. Rules of Statutory Construction Applicable to Indian Legislation Support the Broad Application of Section 81 as Originally Intended by Congress.

Section 81 of United States Code, Title 25, is legislation that was passed for the benefit of Indians. Such legislation is to be liberally construed, and if doubtful expressions are contained in the legislation, they must be resolved in favor of Indians. *See Bryan v. Itasca Co.*, 426 U.S. 373, 392 (1976)

and *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 89 (1918). Statutory rules of construction also require that the foregoing canon be given the broadest possible scope. *DeCoutau v. District County Court*, 420 U.S. 425, 447 (1975).

A rule of construction that is not limited specifically to Indian legislation, but that is applicable here, is the rule that legislation is not intended to be confined to the particular application that was being contemplated at the time the legislation was passed. It is not unusual that as legislation ages, it is applied to circumstances that were utterly uncontemplated at the time of its passage. *See Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). The logic behind this rule, of course, is that as time passes and new factual situations arise which fall under prior existing legislation, Congress, having the power to amend such legislation to avoid such application, is deemed to intend its application.

In the case of Section 81, Congress clearly foresaw the need to protect Indians from unconscionable and improvident contracts. At the time, of course, Congress could not foresee that the persons who would attempt to make such contracts with Indians and Indian tribes would include providers of gambling devices and gambling management services, as well as Indian agents and attorneys. Nevertheless, over time, the courts have recognized the need to broadly construe Section 81 consistent with original Congressional intent and have, in fact, followed these rules of statutory construction to apply Section 81 in new factual contexts. These rules require that Section 81 be broadly interpreted in favor of increased, rather than decreased, protection of commercial relationships between Indians and non-Indians, and be applied to all contracts that are relative to Indian land, not merely "land transaction" contracts as the Seventh Circuit would attempt to so limit Section 81.

CONCLUSION

The decision of the Seventh Circuit in the instant case is contrary to the plain language of Section 81, the Congressional intent underlying it as expressed in the legislative history of Section 81, present day public policy, the prior pronouncements of this Court and other courts interpreting Section 81, the interpretation of Section 81 by the administrative agencies designated to implement it, and canons of statutory construction applicable to Indian law.

As evidenced by the Inspector General's Survey Report, Section 81 is perhaps needed more today by Indians and Indian tribes than when it was originally enacted. Today, instead of just attorneys and Indian agents taking advantage of Indians, there are a whole array of entities exploiting Indians and Indian tribes through the special protections available to gaming activities conducted on Indian reservations. Today, the consequences of such exploitation are even more severe than exploitation of years' past since today's exploitation robs Indians and Indian tribes of the ability to capture significant revenues for the betterment of their people after so many years of impoverishment.

This Court now has the historic opportunity to aid in redressing some of the wrongs of the past by enforcing a federal statute which has been in place since the beginning of our nation's history, a statute designed to prevent Indians and Indian tribes from entering into unconscionable and improvident contracts with others to the detriment of their people. In order to seize this opportunity, this Court should begin by granting Petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals. If this Court declines to do so, then Section 81 will be improperly and unnecessarily eviscerated and the exploitation

of Indians, especially in the area of Indian gaming, may unfortunately continue as it has throughout far too much of our nation's history.

If, in fact, it is the intent of this Court to allow the continuing erosion of Section 81 and the protections it was meant to afford to Indians and Indian tribes, then such a pronouncement should also be made explicitly by this Court, rather than allowing the same result to be accomplished by default through the actions of lower courts. At this critical juncture in the history of gaming on Indian lands, now is the time for a specific pronouncement in this area to be made and the United States Supreme Court should make it.

Respectfully submitted,

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Dated: November 10, 1993

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United States Department of the Interior

OFFICE OF THE INSPECTOR GENERAL
Washington, D.C. 20240

December 31 1992

MEMORANDUM

TO: The Secretary

FROM: Inspector General

SUBJECT: Final Survey Report for Your Information - "Implementation of the Indian Gaming Regulatory Act"

DISCUSSION: The subject report is the first in a series of reports on Indian gaming. The objective of this review was to determine whether Federal and state governments had taken appropriate action to implement the Indian Gaming Regulatory Act of 1988.

We found that Federal and state governments did not ensure that high stakes bingo and casino gambling on Indian reservations were properly established and adequately regulated. Various factors contributed to this serious lack of oversight of Indian gaming operations. First, many tribes had started gaming operations prior to passage of the Act; as such, there was insufficient lead time for the establishment of a regulatory process. In addition, the National Indian Gaming Commission (authorized by the Act) has directed its initial efforts to issuing regulations and not to monitoring Class II (high stakes bingo) operations, the Bureau of Indian Affairs lacked the staff and expertise to evaluate management and equipment leasing contracts in a effective manner, and some states have been reluctant to negotiate compacts with tribes for the establishment and control of Class III (casino) gambling. As a result, some gaming establishments are operating in direct violation of the Act, and substantial amounts of gaming revenues

that should have been realized by tribes are being diverted to companies hired to manage and equip the gaming operations. During our review, we identified gaming revenues of over $12 million that may have been diverted improperly from tribes to operators and suppliers, principally because of theft and mismanagement by contracted operators of gaming establishments.

Despite these problems, Indian gaming has had a positive impact on the economies of certain tribes and state governments. Unemployment has been reduced, and tribes have invested gaming profits in education, housing, health care, and community projects. However, we believe that Federal and state governments need to become more actively involved in the oversight and regulation of Indian gaming to ensure that the interests of Indian tribes are adequately protected.

We recommended that the Assistant Secretary for Indian Affairs, in coordination with the National Indian Gaming Commission, develop an action plan and oversight process for identifying and evaluating Class II and Class III operations; allocate sufficient resources to the process; and ensure that states and tribes are complying with the gaming oversight provisions of their compacts. Managements' response to the draft report identified various actions that were or would be taken to meet the intent of all three recommendations.

s/s Joyce N. Fleischman

for James R. Richards

Attachment
Prepared: Harold Bloom
Extension: 208-4252

U.S. Department of the Interior
Office of Inspector General

SURVEY REPORT

IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT

REPORT NO. 93-I-349
DECEMBER 1992

This report may not be disclosed to anyone other than the auditee except by the Assistant Inspector General for Administration, Office of Inspector General, U.S. Department of the Interior, Washington, D.C. 20240

United States Department of the Interior
OFFICE OF INSPECTOR GENERAL
Headquarters Audits
1550 Wilson Boulevard
Suite 401
Arlington, VA 22209

December 31, 1992

MEMORANDUM SURVEY REPORT

To: Assistant Secretary for Indian Affairs
Chairman, National Indian Gaming Commission

From: Assistant Inspector General for Audits

Subject: Final Survey Report on Implementation of the Indian Gaming Regulatory Act (No. 93-I-349)

INTRODUCTION

This report presents the results of our survey of the implementation of the Indian Gaming Regulatory Act. We performed the survey because allegations concerning contracts for gaming services indicated that excessive revenues were being realized by operating companies at the expense of the tribes and that other improprieties in certain gaming operations on Indian lands also existed.

Over 170 tribes have started high stakes bingo games and/or casino-type gambling, such as blackjack, poker, and slot machines. With the revenues received from gaming operations, some tribes have been able to build schools, hospitals, sewer and water systems, and other community facilities. Gaming revenues have also provided capital for financing new tribal industries. Further, gaming has provided employment for many Native Americans who live in economically depressed areas and overall has increased self-sufficiency on many Indian reservations.

However, our review concluded that there has been a lack of oversight of Indian gaming, which has adversely impacted the amount of proceeds being realized by some tribes involved in gaming operations. This occurred, in part, because the Act did not provide sufficient lead time for the Department of the Interior to establish a regulatory process for monitoring Indian gaming prior to the tribes' being given authority to proceed with gambling operations. Also by law, the Federal Government is severely limited in the amount of oversight it can provide over what is considered Class III gaming (casinos). In addition, the Bureau of Indian Affairs, the National Indian Gaming Commission, and some states have not been diligent or timely in the establishment and execution of oversight arrangements required by the Act to monitor casino gambling and bingo games. As a result, some gaming establishments are operating in direct violation of the Act, and Indian tribes may be losing significant income

because of fraud or abuse in an industry that is generating revenues of approximately $2 billion a year on Indian lands.

BACKGROUND

Historically, the majority of Indian reservations have been economically depressed and have experienced some of the highest rates of poverty, unemployment, and other adverse socioeconomic conditions in the country. During the 1980s, many Indian tribes became involved in gaming activities on Indian lands as a means of generating revenues for tribal governments. Consequently, after years of debate, the Congress passed the Indian Gaming Regulatory Act (Public Law 100-497, as amended) to provide policy and standards for the conduct of gaming on Indian lands. The Act was signed into law on October 17, 1988, and provides the regulatory framework for various forms of gambling on tribal lands. A primary purpose of the Act is to provide a statutory basis for tribal gambling activities as a means of promoting economic development, self-sufficiency, and strong tribal government.

The Act defines three classes of Indian gaming as follows:

- Class I gaming includes social or traditional gaming that is played in connection with tribal ceremonies or celebrations.

- Class II gaming includes bingo and, if played at the same location, pull tabs, lotto, punch boards, tip jars, instant bingo, and card games (such as poker) not played against the house when permitted by state law.

- Class III gaming includes card games, table games (such as blackjack and craps), slot machines, electronic or electromechanical facsimiles of games of chance, and parimutel wagering. Class III gaming is lawful on Indian lands only if it is conducted in conformance with a tribal-state compact that has been approved by

the Secretary of the Interior.

In Section 5 of the Act, the Congress established the National Indian Gaming Commission as the Federal agency with primary regulatory responsibility over Indian gaming operations. The Commission was included as part of the Department of the Interior but in reality operates as an independent agency. The primary role of the Commission is to issue regulations governing gaming activities, approve tribal ordinances for regulating Class II and Class III gaming, approve management contracts for Class II and Class III gaming, and monitor and regulate Class II gaming operations throughout the United States. The Commission is also responsible for investigating allegations of improper activities and conducting background investigations as necessary. When such investigations indicate a violation of Federal, state, or tribal statutes, the Commission is required to refer the matter to the appropriate law enforcement officials. In that regard, Section 17 of the Act requires the Attorney General to investigate activities associated with gaming authorized by the Act that may be a violation of Federal law.

The Act gave the Secretary of the Interior interim responsibilities for the supervision of Indian gaming until the Commission was fully organized and had established the regulations needed for oversight of Indian gaming. During this interim period, the Secretary delegated oversight responsibilities to the Assistant Secretary for Indian Affairs. These responsibilities included but were not limited to ensuring that background investigations on casino management officials are performed and reviewing and approving compacts between the tribes and the states and contracts between the tribes and management companies.

Sections 11 and 12 of the Act authorize Indian tribes to enter into management contracts for the operation of Class II and Class III gaming activities. Section 12

further states that the Commission may approve a management contract only if it determines that the contract provides for (1) adequate accounting procedures and monthly verifiable financial reports, (2) tribal access to daily operations, (3) a minimum guaranteed payment to the Indian tribe that has preference over development and construction costs, (4) a ceiling for the repayment of development and construction costs, (5) a contract term not to exceed 7 years, (6) termination provisions, and (7) a reasonable fee that does not exceed 40 percent of the net revenues. Tribes often engage the services of management companies to provide for the establishment and management of these facilities. Because of the potential for substantial profits (up to 40 percent of the net income) that can be derived from these lucrative gaming operations, we found that individuals or enterprises with no expertise in gaming or construction and unverified financial backing have at times been offering tribes up-front payments of as much as $1 million to sign management contracts. As of October 1, 1992, we estimated that well over 200 contracts for management, leasing, or supply services had been entered into for Class II and Class III operations.

The framework for regulating Class III gaming is structured in accordance with compacts between the tribes and the states in which the games are operated. Compacts may include (1) provisions concerning criminal and civil laws directly related to gaming, (2) provisions for monitoring and allocating jurisdiction between the state and the tribe, and (3) standards for operating and maintaining a gaming facility. Overall, the Indian Gaming Regulatory Act recognizes Indian sovereignty over gaming and that Indian tribes have the right to regulate gaming activities on Indian lands subject to the provisions of the Act. The states' regulatory role in this process generally includes monitoring and inspecting operations of the various casino games.

As of November 1992, 171 tribes had initiated 257 gaming operations, including 84 Class III and 173 Class II establishments (Appendix 3), with revenues from these operations growing significantly. For instance, the revenues generated from Indian gaming in Minnesota alone totaled approximately $900 million during 1991. Tribal gaming throughout the country has had a major economic impact on the self-sufficiency of Indian people. In that regard, a 1991 study conducted by the Minnesota Indian Gaming Association, an association of tribes with gaming operations in Minnesota, concluded that since 1984, when Minnesota's first Indian gaming casino opened, tribal governments throughout the state recognized Indian gaming as a means of achieving what Federal policy had failed to accomplish over the past hundred years in terms of self-sufficiency and economic independence for Native Americans. Tribes are investing gaming profits in education, housing, community projects, infrastructure improvements, health care, economic development, and increased law enforcement

OBJECTIVE AND SCOPE

The objective of the survey was to determine whether Federal and state governments had taken appropriate action to implement the Indian Gaming Regulatory Act of 1988. To accomplish our objective, we contacted officials and requested data from 10 of the 12 Bureau of Indian Affairs area offices (Appendix 2), and we interviewed officials from Bureau headquarters, the National Indian Gaming Commission, the Department of Justice, Indian tribes, and state governments. The survey was performed from September through October 1992 at the Bureau of Andian Affairs and National Indian Gaming Commission offices in Washington, D.C., and the Bureau's Minneapolis Area Office and one tribal casino. Our survey was made in accordance with the auditing standards issued by the Comptroller

General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances. Generally, our survey was limited to an overview of actions involved in establishing and monitoring Class II and Class III gaming and did not include reviews of gambling operations.

We also reviewed the Department of the Interior Annual Statement and Report, required the Federal Managers' Financial Integrity Act, for fiscal year 1991 to determine whether any reported weaknesses were within the objective and scope of our survey. We found that no weaknesses on the subject were reported by either the Bureau of Indian Affairs or the Office of the Secretary.

PRIOR AUDIT COVERAGE

Neither the Office of Inspector General nor the General Accounting Office has audited any Indian gaming operations or activities during the past 5 years.

RESULTS OF SURVEY

Approximately 260 gambling operations that generate revenues of $2 billion a year have been established on Indian lands with minimal or no effective oversight from Federal or state governments. As a result, substantial amounts of gaming revenues that should have been realized by the tribes are instead being siphoned off by enterprises hired to manage and equip the gaming operations. During our limited review, we identified situations where gaming revenues of over $12 million may have been improperly diverted from tribes to operators and suppliers, principally because of theft and mismanagement by contracted operators of gaming establishments.

The Indian Gaming Act of 1988 established a framework for joint Federal, state, and tribal control of

Indian gaming through the approval, execution, and monitoring of tribal and state compacts and management contracts. In addition, the United States Code (25 U.S.C. 81) requires that the Secretary of the Interior approve all Indian contracts or agreements relative to Indian lands. The Assistant Secretary for Indian Affairs has interpreted this section to include management and equipment leasing contracts. However, the National Indian Gaming Commission has not yet issued all necessary regulations or assumed any regulatory responsibility, the Bureau of Indian Affairs has failed to exercise adequate supervision during the interim period, and some states have been reluctant to negotiate compacts with tribes. Consequently, of the 84 Class III establishments initiated by tribes, 33 are operating without approved tribal-state compacts (Appendix 4), and 8 are operating without approved management contracts (Appendix 5). Also, of the 173 Class II gaming establishments, at least 24 do not have approved management contracts (Appendix 6). Further, many equipment leasing contracts have also not been approved by the Bureau.

The operation of a Class III establishment without an approved tribal-state compact is a violation of the Act and places the operation in jeopardy of closure by the Department of Justice. This situation occurred in Arizona in May 1992, when law enforcement officials raided five bingo hall operations and seized 750 video poker machines because tribal-state compacts had not been approved. Therefore, the potential exists for tribes that are operating Class III casinos without valid compacts to forfeit significant revenues. We have also been informed by Bureau officials that besides the lack of many tribal-state compacts and approved management contracts, there are many more unapproved equipment leasing, supply, and service contracts in existence. The Bureau did not have a system to keep track of these service contracts. Also, the tribes have been reluctant to provide this information to

the Bureau. We plan to identify the extent and the impact of unapproved service contracts in subsequent audits.

In addition to the unapproved compacts and contracts, we believe that many of the approved contracts do not comply with those provisions of the Act that require the tribes to receive a primary benefit from the gaming operation. Bureau officials said that contracts were approved if they were within the Act's broad guidelines relative to a maximum term of 7 years and a maximum fee percentage for the operators of 40 percent. Our survey showed, however, that economic evaluations of proposed operator costs were not being accomplished by the Bureau because it did not have a sufficient number of experienced personnel available in the field offices who could perform these evaluations or guidelines for performing financial analysis of contractor proposals. Therefore, the tribes may not have received an equitable share of revenue from the terms of the contracts. For example:

- We were informed by Bureau officials that a tribe may lose an estimated $4.5 million because of mismanagement on the part of the management company hired to operate its Class III casino. The Bureau of Indian Affairs did not approve the management contract because of controversaries surrounding the firm. According to Bureau officials, the tribe had $2 million in savings prior to hiring the management company. However, after 1 1/2 years of gross mismanagement by the company hired to manage the gaming operation, the tribe was $2.5 million in debt. The tribe has since filed a lawsuit against the management firm in an attempt to recover some of its losses.

- Information provided by Tribal officials indicated that a casino leasaed 172 slot machines from a company that, as the tribe later discovered, was owned by the casino manager and the tribal attorney. This lease was not submitted to the Bureau for approval.

Under the terms of the lease, the tribe paid the leasing company 37 percent of the gross income from those slot machines (the amount wagered less than amount of payback) each month for the rental of the machines. For the first 21 months of this 60-month closed-end[1] contract, the tribe paid rentals totaling over $2.5 million, which was over three times the estimated $800,000 acquisition cost of the equipment. The tribe discharged the casino manager after it learned of his involvement in the leasing company and hired a new manager who was attempting to cancel the remaining 39 months of the lease. The tribe may, however, still be liable for estimated monthly payments of $120,000 for the remaining 39 months if the contract cannot be canceled, or a total of $4.7 million. Consequently, this contract may end up costing the tribe an estimated $6.4 million more than if the equipment had been purchased outright. Further, the tribe received only a school bus as its share of gaming proceeds for the nearly 3 years the casino/bingo hall was run by the former manager because its 63 percent share of the gross revenue was used to pay operating costs and finance capital improvements. The leasing firm was also leasing equipment to at least two other Indian casinos. Those leases will be reviewed in subsequent audits.

- We were informed by Department of Justice officials that the owner of a business that provided check-cashing services for Indian casinos was indicted on a fraudulent check-cashing scheme that cost certain tribes at least $600,000. Ten Indian casinos in three states were victimized by this operation. The Bureau of Indian Affairs has no record of approving any of the contracts between the affected tribes and the check-cashing service. This check-cashing service was bonded for only $5,000, even though it was handling several hundred thousand dollars a week. If the Bureau had reviewed

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[1] Closed-end leases do not provide for a buyout at the end of the lease term.

these contracts prior to their execution, this type of loss may have been prevented.

- We found that a corporation that was hired to operate an Indian casino that had no tribal-state compact pled guilty to a felony count of operating illegal gambling on an Indian reservation. The corporation was fined $100,000 and forfeited $308,000 in cash and seized equipment. In addition, each of the corporation's six stockholders pled guilty to one misdemeanor count under the Indian Gaming Regulatory Act and was fined $500.

- A financial investigation conducted by a tribe disclosed that a tribal gaming operations manager had mismanaged, overpaid, and failed to document nearly $250,000 in expenses during the 1 1/2 years the manager was employed by the gaming operation. The investigation disclosed that the manager lived in an apartment that was inappropriately paid for by the casino, was directly involved with over $70,000 in unsupported or duplicate travel cost reimbursements, and authorized tens of thousands of dollars for unsupported petty cash payments. In addition, the manager did not obtain competitive bids for over $700,000 of construction work, which the financial investigation determined to be substantially overpriced.

- A tribal official told us that a casino manager hired by a tribe was allowed to have exclusive control over operation of a bingo hall and a casino. When the tribal oversight commitee attempted to assess operation of these activities, the casino manager refused to provide the information requested and the tribal Chairman did not support the committee's attempts to obtain this information. As a result, no one from the tribe but the tribal Chairman had any knowledge of casino operations. The casino manager kept his position for 2 years after he moved to the state capital. During the 2 years he was absent from casino operations, he was paid about $120,000 in salary and well over $80,000 for his personal expenses.

- Information provided by Departmental officials indicated that several tribes contracted with a single individual to manage a joint bingo hall operation. Apparently unknown to these tribes was the fact that the proposed manager had been accused by another tribal bingo hall of embezzling about $200,000 just prior to the tribes' signing the contract. The Bureau did not approve this contract; yet it took over 7 months to shut down the operation and file charges against the manager. Had the Bureau completed a thorough background investigation, as required by the Act, the theft allegation would have likely been called to the attention of tribal officials and the contract would not have been awarded.

- We found that an Indian tribe signed a contract with a management company to finance, build, and manage a $10 million gaming/retail complex, even though the company had no apparent source of funding and no expertise in construction or casino management. The tribe hired a private investigator to conduct a background investigation, but before the investigation was completed, the tribe signed the contract. According to one Federal official $5 million of the funding for this casino included "three negotiable instruments made out in German, drawn on a Swiss bank account, and payable to an Italian national." The international financial arrangements indicate the need for constant scrutiny to ensure that such arrangements are sound and protect the interests of Indian tribes.

Indian Gaming Regulatory Act

In May 1992, the Chairman of the Select Committee on Indian Affairs presented, to an oversight committee, testimony on implementation of the Indian Gaming Regulatory Act. The Chairman indicated that the National Indian Gaming Regulatory Act was passed as a compromise measure, which the Congress hoped would be mutually agreeable to the tribes and the

states. The 1987 Supreme Court decision on *Cabazon v. California*, which ruled that the states could not control gaming on reservation lands, and the fact that some tribes were already engaged in gaming were factors contributing to the passage of the Act by Congress. Although the Act designated the Department as responsible for regulating Indian gaming until the Commission was operational, the Department did not have time to set up a regulatory authority because tribes were already involved in gaming activities. Furthermore, the Act contains provisions that share responsibility for regulation of casino gaming between the National Indian Gaming Commission, the Secretary of the Interior (Bureau of Indian Affairs), the various states that have negotiated tribal state compacts, and the Indian tribes on whose land the gaming facility is operated (Appendix 7). The Act gives the Commission responsibility for approving tribal ordinances and management of contracts for Class II and Class III operations, whereas the Bureau is responsible for approving (1) the placing of land into trust for gaming purposes, (2) tribal-state compacts, and (3) equipment leasing and service contracts. In addition, according to the Act, the states are required to negotiate the compact with the tribe in which they agree on a plan to regulate Class III gaming activities. Hence, it is the states, not the Federal Government, that have primary oversight responsibilities over Class III gaming operations. Our review has shown, however, that states have often been reluctant to fulfill their responsibilities to regulate Class III gaming; consequently, many casinos have no independent oversight of operations, which increases the potential for fraud and abuse. This distribution of duties will require extensive coordination between the oversight entities, or some of the requirements may be inadvertently omitted to the detriment of the tribes.

Status of the Commission

The National Indian Gaming Commission is not yet fully operational 4 years after passage of the Act. Initial delays occurred because it took nearly 1 1/2 years to appoint the Commission Chairman and almost 1 year after that to appoint the two Commissioners. Further, the Commission has planned a cautious, methodical approcah to its regulation of Indian gaming. Its first priority was to promulgate policy regulations, leaving management oversight as a Bureau responsibility. Commission members said that they soon hoped to finalize the last four of the total of six sets of regulations and then to direct their efforts to regulation. The Chairman of the Commission recently told the National Indian Gaming Association that Indian gaming would be better regulated than any other form of gaming in the country. He said that he expects the Commission to begin full operation by the end of 1992. However, our review showed that it may be at least an additional year until the Commission is fully operational. When operational, the Commission will investigate allegations of improper activities, conduct or cause to be conducted background investigations as necessary, and review and approve contracts between tribes and management companies.

In addition, the Commission will have operational oversight responsibility for all Class II operations and will collect fee assessments from those facilities to pay for the Commission's operations. In becoming operational, the Commission intends to use its $3 million budget and its estimated staff of 24 to oversee 173 Class II Indian gaming operations across the country. In contrast, we learned that the Nevada Gaming Commission, which oversees about 350 gaming operations in Nevada, has an $18 million budget and 394 employees. The New Jersey gaming regulators have responsibility for 12 gaming operations in Atlantic City and have a $60 million budget and 985 employees.

State Government Actions

Some states have been reluctant to negotiate compacts with Indian tribes because of insufficient state funding for regulatory activities and an expressed aversion to becoming involved in the internal affiars of tribal operations. The Act requires states to negotiate compacts with tribes in good faith. However, as of August 16, 1992, 16 lawsuits had been filed by tribes against 15 states for the failure to complete negotiations.[2] Consequently, at least 33 Class III gaming establishments are operating without approved compacts and an independent regulatory process.

Departmental Oversight

The Department was not prepared for nor did it anticipate its role in supervising Indian gaming. It had no lead time to establish oversight capability because many tribes were already operating casinos and bingo halls at the time the Act was passed. Also, the Department said that it believed the Commission and states would be the primary regulators. As a result, the Department's planning and oversight activities did not progress at a sufficient pace to meet the needs of the tribes that were expediting the establishment of gaming operations. For example, as of February 1992, Indian tribes in Minnesota had 13 casinos and 15 bingo halls in operation, with over 9,189 slot machines and 494 blackjack tables and annual revenues estimated at $1.2 billion. Also, during this period, tribes in the States of Arizona, California, Connecticut, Michigan, Montana, South Dakota, Washington, and Wisconsin instituted sizable gaming operations. The total amount realized from Indian gaming operations in 1992 is estimated to be $2 billion. However, it was not until December 1991

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[2] On October 24, 1992, the Congress enacted a bill that allows Indian gaming to resume in Montana for a period of 6 months, while the tribes and the state negotiate compacts.

that the Secretary established the Task Force on Indian Gaming Management and not until March 1992 that the Assistant Secretary for Indian Affairs issued the Task Force recommendations and additional guidelines for reviewing contracts, leases, subcontracts, assignments, or agreements submitted after March 6, 1992. Therefore, for 41 months (between October 1988 and March 1992), minimal formal guidance was provided to the Bureau area offices, and neither the Commission nor the Bureau was prepared to provide the tribes financial advice or assistance.

With little or no Federal guidance and oversight, many of the tribes were in a disadvantageous position when negotiating with companies that were hired by the tribes to manage gaming operations. This resulted in these companies' often taking advantage of the tribes by entering into inequitable agreements and contracts.

Recent Bureau Actions

At the time of our review, the Bureau was planning to create the Office of Indian Gaming Management. The Congress has provided funds of $550,000 and authorized the Bureau to reprogram additional funds to provide a fiscal year 1993 budget of $1.5 million for the Office of Indian Gaming Management. The Office will have regulatory responsibility and will be created in accordance with the Secretary's February 29, 1992, directive. The purpose of the Office will be to address and remedy problems related to unapproved gaming management contracts, conditional approval of management contracts without completion of background investigations, unapproved per capita distributions, approval of leases and assignments without compliance with environmental requirements, off-reservation land purchases, and other related gaming matters. According to the Bureau's justification, the Office will consist of 12 "highly skilled" individuals who have expertise in one or more of the following areas: tribal government, con-

tracting, realty, accounting, financial analysis, legal analysis, data/automated data processing, criminal investigations, and the environment.

Conclusion

Despite the significant problems related to Indian gaming, Indian gaming has had a positive impact on the economies of certain Indian tribes and state governments. For example, casinos and bingo halls in Iowa, Michigan, Minnesota, and Wisconsin have employed over 12,300 people, including 4,000 Indians. Because of such benefits, many of the tribes allow gaming halls and casinos to operate, even though they are aware that the operations are not in compliance with the Act. However, although some progress has been made in complying with the Act, Federal and state governments need to become actively involved in the oversight and regulatory process to ensure that Indians are the primary beneficiaries of gambling on Indian lands. Therefore, immediate action is needed to ensure that fair and equitable agreements are negotiated which protect the interests of Indian tribes and that effective enforcement mechanisms are in place and operating.

Recommendations

We recommend that the Assistant Secretary for Indian Affairs, in coordination with the Chairman of the National Indian Gaming Commission:

1. Develop an action plan and oversight process that will (a) identify all Class II and Class III gaming operations; (b) prioritize gaming operations for review, concentrating on activities with unapproved compacts and management contracts; (c) expedite completion of approved management contracts and state-tribal compacts where such contracts and compacts have not been finalized; and (d) provide an orderly transition of responsibility for oversight of gaming from the Bureau

to the Commission.

2. Ensure that the states and tribes are complying with gaming oversight provisions of their compacts as these provisions relate to the conduct of games, payout of machines, independent audits of financial records, and licensing of employees involved in gaming activities.

3. Allocate sufficient resources to the oversight and monitoring of Indian gaming to ensure that the Department of the Interior meets its responsibilities under the Indian Gaming Regulatory Act of 1988.

Bureau of Indian Affairs Response

The December 4, 1992, response from the Assistant Secretary for Indian Affairs (Appendix 8) indicated concurrence with Recommendations 1 and 3 and nonconcurrence with Recommendation 2. The Bureau also provided comments on the draft report, which we considered in finalizing the report.

Recommendation 1. The Bureau stated that it had established a plan to identify all Class II and Class III gaming operations and to prioritize gaming operations for review. The Bureau also stated that its oversight of tribal gaming operations is "ongoing" and that it has scheduled several reviews of gaming operations designed to bring the operations "into compliance with the Indian Gaming Regulatory Act." The Bureau further stated that it has held periodic meetings with the Commission to provide for the "orderly transfer" of gaming functions to the Commission and that these meetings "will continue" through the "transition of gaming responsibilities."

Recommendation 2. The Bureau stated that the Act specifically "reposed total responsibility for regulation of gaming related activities on the tribes and the states by providing the compact process." The Bureau stated, however, that it would work with tribal and state offi-

cials to resolve gaming-related problems and improve tribal-state relationships. The Bureau also stated that it would work with the National Indian Gaming Association, the North American Gaming Regulators Association, the National Attorneys General Association, and other related organizations to improve tribal-state relations as they pertain to gaming operations.

Recommendation 3. The Bureau stated that it has developed an forwarded to the Department for approval an organizational structure to oversee the Department's gaming responsibilities. According to the Bureau, this structure will consist of 15 individuals and will be responsible for "policy development and oversight actions to insure that tribal-state compacts, distribution of per capita payments, land acquisitions for gaming purposes, and leases collateral to primary gaming activities are in compliance with the Act."

National Indian Gaming Commission Response

Even though our recommendations were addressed to the Bureau, the Chairman of the National Tribal Gaming Commission expressed general agreement with the recommendations in a December 4, 1992, memorandum (Appendix 9). The Commission's comments were also considered in preparing our final report.

Office of Inspector General Comments

The Bureau's response was sufficient for us to consider Recommendations 3 resolved and implemented, and additional information is needed for Recommendations 1 and 2 (see Appendix 10). Although the Bureau did not concur with Recommendation 2, it provided alternative actions to meet the intent of the recommendations.

In accordance with the Departmental Manual (360 DM 5.3), please provide us with your written comments to this report by March 5, 1992. Your comments should

provide the information requested in Appendix 10.

The legislation, as amended, creating the Office of Inspector General requires semiannual reporting to the Congress on all audit reports issued, the monetary impact of audit findings (Appendix 1), actions taken to implement audit recommendations, and identification of each significant recommendation on which corrective action has not been taken.

s/s

Harold Bloom

APPENDIX 1

CLASSIFICATION OF MONETARY AMOUNTS

Finding	Funds To Be Put To Better Use*
Gaming Revenues Lost	$12.4 million

* Amount represents non-Federal funds.

APPENDIX 2

BUREAU OF INDIAN AFFAIRS OFFICES CONTACTED

Office	Location
Aberdeen Area Office	Aberdeen, South Dakota
Albuquerque Area Office	Albuquerque, New Mexico
Anadarko Area Office	Anadarko, Oklahoma
Billings Area Office	Billings, Montana
Eastern Area Office	Arlington, Virginia
Minneapolis Area Office	Minneapolis, Minnesota
Muskogee Area Office	Muskogee, Oklahoma
Phoenix Area Office	Phoenix, Arizona
Portland Area Office	Portland, Oregon
Sacramento Area Office	Sacramento, California

TRIBES WITH GAMING OPERATIONS

Area Office	Number of Tribes	Gaming Operations		
		Class II	Class III	Total
Aberdeen	16	11	11	22
Albuquerque	10	9	8	17
Anadarko	21	19	0	19
Billings	5	3	15	18
Eastern	21	18	3	21
Minneapolis	30	49	33	82
Muskogee	10	17	0	17
Phoenix	12	7	2	9
Portland	23	20	6	26
Sacramento	23	20	6	26
Total	171	173	84	257

APPENDIX 4

STATUS OF TRIBAL/STATE GAMING COMPACTS

Area Office	Total Class III Gaming	Without Bureau Approved Compacts	With Approved Compacts
Aberdeen	11	2	9
Albuquerque	8	7	1
Anadarko	0	0	0
Billings	15	13*	2
Eastern	3	0	3
Minneapolis	33	7	26
Muskogee	0	0	0
Phoenix	2	0	2
Portland	6	4	2
Sacramento	6	0	6
Total	84	33	51

* Thirteen gaming operations are temporarily approved by an Act of Congress.

STATUS OF MANAGEMENT CONTRACTS FOR CLASS III GAMING ESTABLISHMENTS OPERATED BY CONTRACTORS

Area Office	Total Class III Gaming	Less Establishments Operated by Tribe	Balance Requiring Contracts	Approved Contracts	Without Approved Contracts
Aberdeen	11	6	5	1	4
Albuquerque	8	6	2	2	0
Anadarko	0	0	0	0	0
Billings	15	11	4	1	3
Eastern	3	1	2	2	0
Minneaopolis	33	27	6	6	0
Muskogee	0	0	0	0	0
Phoenix	2	2	0	0	0
Portland	6	4	2	2	0
Sacramento	6	0	6	5	1
Total	84	57	27	19	8

APPENDIX 6

STATUS OF MANAGEMENT CONTRACTS FOR CLASS II GAMING ESTABLISHMENTS OPERATED BY CONTRACTORS

Area Office	Total Class II Gaming	Less Establishments Operated by Tribes	Balance Requiring Contracts	Approved Contracts	Without Approved Contracts
Aberdeen	11	8	3	1	2
Albuquerque	9	5	4	2	2
Anadarko	19	14	5	1	4
Billings	3	1	2	1	1
Eastern	18	9	9	9	0
Minneaopolis	49	36	13	9	4
Muskogee	17	13	4	3	1
Phoenix	7	4	3	0	3
Portland	20	15	5	4	1
Sacramento	20	8	12	6	6
Total	173	113	60	36	24

OVERSIGHT OF INDIAN GAMING AS SPECIFIED IN THE INDIAN GAMING REGULATORY ACT

Commission	Bureau of Indian Affairs	States	Tribes
· Issue regulations	· Approve tribal land used for casinos	· Establish and implement compact with tribe	· Establish and implement compact with state
· Approve tribal ordinances	· Approve compacts	· Provide day-to-day casino oversight	· Make per capita distribution
· Approve management contracts	· Approve leases, supply and service contracts		· Provide day-to-day casino oversight
· Conduct background investigations on management officials	· Approve per capita distributions		
· Refer allegations			
· Monitor and regulate Class II gaming			

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Dec 04 1992

Memorandum

To: Assistant Inspector General for Audits

From: Acting Assistant Secretary - Indian Affairs *s/s*

Subject: Response to Draft Survey Report on Indian Gaming Activities (Assignment No. C-IA-BIA-007-92)

INTRODUCTION

This memorandum presents the response of the Bureau of Indian Affairs (BIA) to the above referenced draft survey report (Survey) dated October 29, 1992. Our response is provided in two parts: Part I consists of the BIA's comments relative to the survey report's factual analysis and conclusions made regarding Indian gaming operations. Part II responds to the OIG's recommendations and includes explanatory information.

PART I

The BIA is aware that a number of Class III gaming establishments are operating without approved compacts and management contracts. On page 5 of the Survey, the Office of the Inspector General (OIG) reports that "well over 200 contracts have been entered into for gaming operations." The BIA cannot verify this number. BIA survey data indicates the number to be 30 instead of 27 operations without approved contracts and 48 instead of 50 operations without approved management contracts. BIA survey data

indicates 6 of the 48 are conditionally-approved management contracts.

The BIA does not have information to support the report's statement that gaming revenues of over $12 million may have been improperly diverted from tribes in favor of operators and suppliers.

In 1984, the BIA issued guidelines to the area directors in response to the rapid increase in high stakes bingo operations being opened by the tribes. These guidelines were revised in April 1985, and again on April 7, 1986. All of the guidelines were developed to govern the review and approval of bingo management contracts only and not casino-type gaming since Class III type gaming was not yet authorized. The 1986 guidelines continued to be used even after passage of the Indian Gaming Regulatory Act in 1988 (IGRA) even though by this time, many of the tribes had expanded their bingo operations to include Class III type gaming.

The statement that many of the approved contracts do not comply with provisions of the IGRA which require the tribes to receive primary benefit from the gaming operation is accurate. The primary reason this is true is because a number of these contracts were approrved prior to passage of the IGRA and did not contemplate the requirements contained in the IGRA. Moreover, the majority of these contracts were for management of high stakes bingo operations. Since the passage of the IGRA in 1988, new forms of high tech gambling have been developed which were not available at the time these contracts were approved. The manufacturers of these new games promoted them aggressively as benign facsimiles of bingo which tribes believed were authorized as Class II type gambling. Consequently, tribes did not see the need to seek modifications to existing approved contracts to include them. Given the infancy of the IGRA and the lack of definitions classifying these new games, the BIA did not feel it had a basis on which it could properly

disallow their use. Presently, there are several ongoing court cases which will, when finally decided, uphold or reject the NIGC's definitions of Class III gaming as being consistent with the IGRA.

The BIA believes that the survey report did not accurately portray the BIA's responsibilities. On page 4 the Report Survey states that the BIA has responsibility for approving tribal gaming ordinances until such time as the NIGC becomes fully operational. The IGRA does not give the Bureau independent authority to approve ordinances. Section 10 of the IGRA is clear that the Secretary can exercise only those authorities he had on the day before the enactment of the IGRA. As such, the BIA only has authority to approve tribal gaming ordinances if the tribe's governing documents require review and approval by the Secretary or his designated representative.

The survey report, on page 15, also contains inaccurate statements relative to certain responsibilities under the IGRA. The Report states: "The Act gives the Commission responsibility for approving tribal ordinances and management contracts for Class III operations, whereas the BIA is responsible for approving (1) the placing of land into trust for gaming purposes, (2) tribal-state compacts, and (3) management contracts." It is true that the NICG has responsibility for approving gaming ordinances and Class III management contracts. But, the NIGC *also* has responsibility to approve Class II management contracts. Once the NIGC is operational, the BIA will no longer have authority or responsibility for approval of any management contracts. The BIA will, however, have continued responsibility for the approval of off-reservation fee-to-trust acquisitions for gaming, approval of per capita distribution plans, approval of business leases and other agreements, approval of tribal-state compacts, and approval of any organic documents that require Secretarial approval. The BIA

will also have continued responsibility for providing technical assistance to the tribes, at their request, for approval of credit and financing requests, and training as deemed appropriate and requested by tribes and BIA staff, and for environmental reviews as may be appropriate or necessary.

The BIA concurs that Congress, in passing the IGRA in 1988, did not give the Department of Interior (Department) sufficient lead time to establish a regulatory authority before allowing tribes to begin gaming activities. With the passage of the IGRA, most assumed that regulation of Indian gaming would easily be accomplished. It was expected that the NIGC would be established quickly and regulations defining the scope of gaming allowed would be developed immediately. In retrospect, everyone would have been better served if an appropriate transition time had been established. Nonetheless, the BIA has established a regulatory capability to address the obligations set forth in the IGRA. The BIA continues to go forward.

Moreover, the tribes were also expected to comply with all of the requirements of the IGRA, even though they frequently voiced a lack of real understanding of the Act. Economic pressure to take advantage of gaming as an economic enterprise without significant gaming expertise too often forced tribes to negotiate contracts with operators under difficult and unfair circumstances. No one foresaw the implications and rapid expansion of high stakes gaming and consequently never considered the need for a moratorium to allow time for the logistical planning and establishment of the regulatory process.

The BIA agrees that states may appear to be reluctant to fulfill certain compact requirements. A result is that some casinos may have little or no oversight of operations by the state. Some states may have resisted negotiating compacts with Indian tribes because of insufficient state funding for regulatory activities and an expressed aversion to becoming

involved in the internal affairs of tribal operations. The BIA, however, does not believe these reasons constitute the total basis for the state's reluctance to fulfill their compact requirements. The IGRA limits the extent of BIA involvement in the compact process. The BIA agrees that states and tribes should work together to provide more regulatory services, but it is not the BIA's function to intervene on either side in the compact process, or even to be involved in the negotiations between two governmental entitites.

The BIA agrees that immediate action is needed to ensure that fair and equitable agreements are negotiated which protect the interests of Indian tribes, and, that effective enforcement mechanisms are in place and operating. To the extent feasible, the BIA will assist tribes, at their request, and provide such expertise and resources deemded necessary to enable tribes to negotiate on an equal basis with prospective contractors and operators. To this end, the BIA has established a Gaming Management Office to ensure that applicable laws and regulations are enforced, and the interests of the tribes are protected. The BIA gaming management office will employ staff with the necessary qualifications to carry out this reponsibility.

According to BIA data and information, $61.1 Million in Direct Loans, Guaranty Loans, and Indian Business Development Grants have been provided to 28 gaming enterprises. The repayment rate for these loans is exceptionally high and only one loan is currently delinquent. This loan is being modified to reflect problems that have arisen as a result of construction delays. The purpose of the Indian Financing Act is to provide economic assistance to Indian enterprises.

The BIA appreciates the OIG's comments regarding the positive investments and activities the tribes are funding with gaming revenues. The opportunity to break out of the poverty cycle is one that tribes have not been provided very often. Congress clearly intended this opportunity when they promoted gaming as a

viable economic vehicle for the tribes. The BIA's support of tribal gaming operations through loans or guaranties must continue, especially in light of the positive effects such as creation of job opportunities, reductions in public assistance and the overall opportunities for a brighter future.

Revenue generated by Indian gaming establishments has, as the survey report states, provided a positive and viable source of funding for Indian tribes. Tribes have enhanced their governmental systems, increased and enhanced reservation infrastructures, built day care centers, fire departments, water and sewage treatment facilities, provided employment opportunities for Indians and non-Indians, provided educational and other training opportunities for members, and provided for investment in other economic development ventures, including purchasing additional land for the tribes.

PART II

RECOMMENDATION 1: Develop an action plan and oversight process that will (a) identify all Class II and Class III gaming operations; (b) prioritize gaming operations for review, concentrating on illegal and unapproved activities; and (c) provide an orderly transition of responsibility for oversight of gaming from the BIA to the NIGC.

RESPONSE: The BIA concurs. Since March 1992 the BIA has initiated a series of actions to identify all Class II and III gaming operations and to prioritize gaming operations for review. An action plan has been established, setting forth objectives and time lines for completion. The plan is updated and amended as new tasks are added or completed and to account for additional or decreased staff.

Additionally, oversight is ongoing. The BIA has, on a regular basis, identified changes in the gaming activity and provided assistance to the BIA staff and the tribes regarding changes in activity. The BIA is working

closely with the OIG to share information regarding identified games, updating of information regarding contracts, compacts and management firms.

The Central Office gaming staff has responded to area, field and tribal requests for technical assistance and training on gaming management issues and problems. Central Office gaming staff has scheduled several on-site visits to assist area/field staff with review of on-going gaming operations and to develop corrective/remedial actions to bring such operations into compliance with the IGRA.

The BIA's plan to provide for the orderly transfer of gaming functions to the NIGC, has consisted of periodic meetings between Central Office and NIGC staff to discuss mutual concerns, problems and the eventual transfer of primary gaming functions. Central Office staff have begun the collection and filing of management contracts, ordinances and related documents to prepare such documents for easy transfer to the NIGC. Meetings will continue to be held with NIGC staff to provide for an orderly transition of gaming responsibilities.

RECOMMENDATION 2: Ensure that the states and tribes are complying with gaming oversight provisions of their compacts as these provisions relate to conduct of games, payout of machines, independent audits of financial records and licensing of employees involved in gaming activities.

RESPONSE: The BIA does not concur. The BIA believes the IGRA specifically resposed total responsibility for regulation of gaming related activities on the tribes and the states by providing the compact process. We believe the IGRA provided both the tribes and states an equal opportunity and responsibility as sovereign governments to insure that compact provisions are enforced and complied with by both sides. BIA involvement to insure compliance with compact provisions would be difficult and impractical.

To the extent feasible, the BIA is willing to work with

tribal and state officials to facilitate meaningful discussions on problematic issues and to enhance the tribal-state relationship. In addition, the BIA will interact/liaison with the National Indian Gaming Association, the North American Gaming Regulators Association, the National Attorneys General Association and other gaming industry-related organizations to improve tribal-state relations as such pertain to gaming operations.

RECOMMENDATION 3: Allocate sufficient resources to the oversight and monitoring of Indian gaming to ensure that the Department meets its responsibilities under the IGRA.

RESPONSE: The BIA concurs. The BIA has responded to the Secretary's Directive to establish a regulatory unit within the BIA to oversee the Department's gaming-related responsibilities by developing the required justification to authorize an organizational modification. The organizational modification including staffing patterns and functional statements have been forwarded to the Department for review and approval. Position descriptions, office space acquisition, budget projections and other logistical plans have been finalized and are capable of immediate implementation upon approval of the organizational modification. A staff of 15 people is proposed and is considered to be sufficient to carry out the Department's residual responsibilities under the IGRA upon transfer of primary gaming functions to the NIGC. The small staff will carry out policy development and oversight actions to insure tribal-state compacts, distribution of per capita payments, land acquisitions for gaming purposes, and leases collateral to primary gaming activities are in compliance with the IGRA.

Upon approval of the organizational modification establishing the Indian Gaming Management Office, permanent qualified staff will be recruited and selected. It is anticipated that the permanent office will be established in the very near future and the BIA can

move forward to staff the Office. It is anticipated that a number of positions will be filled by the end of January 1993. The office will be fully operational by May 1993.

The responsible person for this action is Hilda Manuel, Acting Staff Director, Indian Gaming Management Office. Ms. Manuel can be reached at (202) 219-0994.

APPENDIX 9

NATIONAL
INDIAN
GAMING
COMMISSION

December 4, 1992

To: Harold Bloom
Assistant Inspector General for Audits

From: Anthony J. Hope, Chairman *s/s*
National Indian Gaming Commission

Subject: Draft Survey Report on Indian Gaming Activities

This responds to your request to provide you with our written comments on the Draft Survey Report on Indian Gaming Activities, including whether the National Indian Gaming Commission agrees or disagrees with the findings and recommendations contained in the Report.

The Commission shares the concerns expressed in the Report that some tribal gaming operations are not fully complying with the Indian Gaming Regulatory Act (IGRA) and that some tribes may be losing revenues because of fraud or abuse. The Commission also agrees that everyone involved in the regulation and oversight

of Indian gaming, including the tribes themselves, can do a better job in insuring compliance with the IGRA. The Report assumes, however, that the Secretary of the Interior is vested with broad authority to regulate all Indian gaming. Furthermore, the Report suggests that the Commission could be doing more to regulate Indian gaming than promulgate regulations.

In the introductory paragraph, the Report states

> . . . the Act did not provide sufficient lead time for the Department of the Interior to establish a monitoring and oversight capability prior to the tribes' being given authority to proceed with casino gaming

This statement fails to recognize some basic facts:

(1) Indian gaming existed prior to the passage of the IGRA;

(2) Indian gaming was not authorized and created by the IGRA but was subjected to regulatory oversight and control;

(3) Indian gaming was and continues to be primarily the responsibility of the tribes; and

(4) the Justice Department (U.S. Attorneys and FBI) were given authority to investigate and prosecute violations of the IGRA.

In addition, the Report uses terms and attributes authorities and responsibilities that are not always consistent with the IGRA and the regulations. For example:

- The Report uses the term "casino gaming" to refer to both class II and class III gaming (page 2).

- The Report attributes class III contract approval to both the Commission and the BIA (page 15). Once the Commission's management contract regulations take effect, the Chairman will have the exclusive authority to review and approve all gaming management contracts.

- Contrary to the Report, the Commission will not "conduct background investigations on casino

management officials (page 17 and 27).

The Secretary of the Interior's interim authority to regulate Indian gaming activities is limited to the authority he exercised prior to the enactment of the IGRA. See 25 U.S.C. § 2709. That authority is limited to reviewing gaming contracts under 25 U.S.C. § 81 and leases of Indian land under 25 U.S.C. § 415. The authority of the Secretary to monitor Indian gaming and to take enforcement actions for violations of the IGRA acting pursuant to sections 81 and 415 is far from certain.

The Commission strongly disagrees with the Report's conclusion at page two that the Commission has not been diligent in exercising its responsibilities under the IGRA. The Report states (at page 16) that the Commission is not yet fully operational four years after passage of the IGRA. The Report acknowledges the delays in the appointment of the Commissioners, but appears to be critical of our "cautious, methodical approcah to [the] regulation of Indian gaming." This leaves the erroneous impression that either: (1) there was another regulatory approach available to the Commission other than rulemaking or (2) the Commission is taking too long to issue regulations.

The IGRA clearly recognized that the Commission would need to promulgate regulations before it could begin to regulate. Thus, Congress vested in the Secretary of the Interior the interim authority to regulate Indian gaming "until such time as the Commission is organized and prescribes regulations." 25 U.S.C. § 2709. More importantly, if the Commission had proceeded to carry out its responsibilities under the IGRA without first engaging in rulemaking, it would have been in violation of the Administrative Procedure Act, 5 U.S.C. § 553, and all of the Commission's actions would be subject to challenge. The Commission proceeded in the only lawful manner available.

Since the appointment of the third Commissioner in April of 1991, the Commission has promulgated six sets

of *substantive* regulations (not policy regulations as the Report states) concerning: fee assessments, definitions, tribal ordinances, Privacy Act, compliance and enforcement, and management contracts. The Commission has promulgated these essential regulations in an efficient and timely manner. It is doubtful that the Commission could have proceeded any faster in the promulgation of regulations unless it had been vested with emergency rulemaking authority. The fee assessment and definition regulations are in effect, and the final regulations on tribal ordinances, Privacy Act, and compliance and enforcement are now under review at the Office of Management and Budget. The Commission anticipates completing its work on the management contract regulations -- the last essential set of regulations that will enable the Commission to become operational -- by December 15, 1992.

Promulgating regulations is but one of many vital functions the Commission has accomplished since the appointment of the Chairman in May 1990. Like any new agency, the Commission has had to contend with many necessary but time-consuming tasks, such as acquiring office space, furniture, equipment, supplies, and personnel and developing operating policies, procedures and systems. Moreover, the Commission members and staff have met extensively with Members of Congress and their staffs, Indian gaming tribes, Indian gaming associations, state gaming regulators, governors, state attorneys general, federal, state, and tribal law enforcement agencies, United States Attorneys, and many others. These meetings have been vitally important. We have educated others on the IGRA and the role of the Commission and have developed invaluable relationships with all those that have a role in implementing the IGRA and making it work as Congress intended.

The Report also fails to recognize that policing tribal-state compacts falls to neither the Commission nor the Secretary. That is the responsibility of the tribe and the

state. Thus, the IGRA provides that a compact could include a provision concerning remedies for breach of the agreement, 25 U.S.C. § 2710(d) (3) (C) (v). The IGRA also vests the U.S. district courts with jurisdiction over actions brought by a tribe or a state to enjoin class III gaming activities that are conducted in violation of a tribal-state compact. Section 2710(d) (7) (A) (ii).

Although they appear to be directed to the BIA rather than to the Commission, we have reviewed your specific recommendations and offer the following comments:

1. (a) The BIA has told the Commission that it will provide this information.
   (b) The Commission would welcome whatever information the BIA has that would help the Commission prioritize gaming operations for review. Additionally, information regarding class III operations should be provided to the relevant state authorities and to the Department of Justice.
   (c) The Commission will be prepared to assume its oversight responsibilities for class II gaming as soon as its regulations are effective. The Commission would welcome whatever additional information and assistance the BIA can provide.
2. The Commission does not have the responsibility or authority to ensure that the states and tribes are complying with gaming oversight provisions of their compacts.
3. This comment does not apply to the Commission; it deals with the allocation of Department of the Interior resources.

We want to thank the you and the Inspector General for sharing the draft of your proposed Report with us in advance. We hope you find our comments helpful.

Should you have any questions or want to discuss the Report or our observations further, please call Fred Stuckwisch or me at 202/632-7003.

STATUS OF AUDIT REPORT RECOMMENDATIONS

Finding/Recommendations Reference	Status	Action Required
1	Management concurs; additional information needed.	Provide a copy of the Bureau's action plan to identify all Class II and Class III gaming operations and to prioritize gaming operation for review.
2	Management concurs; additional information needed.	Provide an action plan for the Bureau's efforts to facilitate meaningful discussions on problematic issues and to improve tribal-state relationships, including target dates and titles of officials responsible for implementation.
3	Implemented.	No further action is needed.

ILLEGAL OR WASTEFUL ACTIVITIES SHOULD BE REPORTED TO THE OFFICE OF INSPECTOR GENERAL BY:

Sending written documents to: Calling:

Within the Continental United States

U.S. Department of the Interior
Office of Inspector General
P.O. Box 1593
Arlington, Virginia 22210

Our 24-hour
Telephone HOTLINE
1-800-424-5081 or
(703) 235-9399

TDD for the hearing impaired
(703) 235-9403 or
1-800-354-0996

Outside the Continental United States

Caribbean Area

U.S. Department of the Interior
Office of Inspector General
Caribbean Region
Federal Building & Courthouse
Veterans Drive, Room 207
St. Thomas, Virgin Islands 00802

(809) 774-8300

North Pacific Region

U.S. Department of the Interior
Office of Inspector General
North Pacific Region
238 Archbishop F.C. Flores Street
Suite 807, PDN Building
Agana, Guam 96910

(700) 550-7279 or
COMM 9-011-671-472-7279

Toll Free Numbers
1-800-424-5081
TDD 1-800-354-0996

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HOTLINE

P.O. Box 1593
Arlington, Virginia 22210

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Mar 6 1992

Memorandum

To: All Area Directors

From: Assistant Secretary - Indian Affairs *s/s*

Subject: Indian Gaming

Attached are two documents for your review and action. The first document is Secretary Lujan's Directive on Indian Gaming Management, dated February 28, 1992. This directive sets forth very specific steps and actions pertaining to Indian Gaming.

The second document, dated March 5, 1992, are the guidelines to govern approval of gaming contracts and other gaming activities. These guidelines replace earlier procedures, issued April 7, 1986.

You should carefully consider these documents and distribute them to appropriate staff, with instructions that they likewise read and implement the directives. These two new documents represent the guiding principles from this date forward. Area Directors and Superintendants will be expected to comply fully with all procedures and requirements. Additionally, please distribute this information to the Tribes within your jurisdiction.

You will note on page 2, paragraph E, of Secretary Lujan's Directive that the Bureau of Indian Affairs (BIA) has been mandated to establish a regulatory unit within the BIA to fulfill the Secretary's order. Such an organizational unit represents a permanent, long term capability on the part of the BIA. It will be brought into existence as soon as possible. In the meantime, a Gaming Action Team (Team) is being formed to start

implementing these directives. The Team will also do the organizational work necessary to bring this new unit into existence. Ms. Hilda Manuel is the Interim Director of the project and two people have been detailed to the Central Office to begin this short term task. Other individuals are being identified to join the Team unit in the near future.

As soon as the Team develops an action plan, checklists and other tools, and address issues as they arise, they will be shared with you. Additionally, the Team will be developing a training program and instructional memoranda for use in the BIA. Training plans will be set up in the future.

Ronal Eden, Director of Tribal Services, is my principle lead official in this project and will be responsible for ongoing activity. Questions and comments should be directed to his office.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 5 1992

Memorandum

To: All Area Directors

From: Assistant Secretary - Indian Affairs *s/s*

Subject: Guidelines to Govern the Review and Approval of Gaming Contracts and Other Gaming Activities

This memorandum replaces the memorandum of the Assistant Secretary — Indian Affairs issued on April 7, 1986, governing the review of tribal bingo management contracts.

These guidelines are to be used in reviewing all contracts, leases, subcontracts, assignments or

agreements submitted after March 6, 1992, related to gaming unless otherwise specified in these guidelines. It also includes instructions covering tribal/state compacts and per capita distributions, as well as other general instructions.

A. Delegation of Authority

1. Area Directors are encouraged to solicit the recommendations of the superintendents. However, authority to approve or disapprove contracts, leases, subcontracts, assignments or agreements related to gaming may not be delegated to the superintendents. 10 BIAM 3.5A.

B. Authority of Tribe

1. Any contract, lease, subcontract, assignment, agreement or ordinance must be signed by an authorized tribal official(s) and include a resolution duly adopted by the governing body with a citation of the section of the tribe's organic document which authorizes the action. When the tribe lacks a formal organic document, a tribal resolution adopted by the general council shall be required.

The terms, contract, subcontract or agreement, for purposes of these guidelines, shall include any arrangement whereby any person or entity is providing management skills, technical assistance or management advice or expertise to a tribe or tribal enterprise for a gaming operation, or any portion of such an operation. The term shall also include any agreement which provides any right or authority to approve, disapprove or have any other control over gaming operations or management decisions affecting such operations, including any employment contract employing any person to manage or otherwise direct a gaming operation.

2. A copy of the tribe's ordinance authorizing and regulating gaming on Indian lands within the tribe's jurisdiction must be submitted along with the contract. The contract shall include a statement that the gaming activity to be conducted pursuant to the contract, lease, subcontract, assignment or agreement will be conducted in accordance with the tribal ordinance. The tribal ordinance will identify the system to be used to complete background investigations. A copy of the approved or pending tribal-state compact, if one exists, should also be included.

C. General Contract Content Requirements

All contracts, leases, subcontracts, assignments or agreements must meet each of the criteria set forth below. In order to facilitate review, contracts shall address each of these criteria in separate paragraphs or sections, each of which should be titled and numbered accordingly.

1. The contract, lease, subcontract, assignment or agreement must set forth: (a) the time and place where it was made, (b) the purpose for which it was made, (c) the services and/or products to be provided under it.

2. A clear statement of the obligations of the contractor, including for example, whether the contractor is responsible for such items as:

a. Maintaining or improving the gaming facility;
b. Providing operating capital to the gaming operation, under what circumstances, and in what amounts;
c. Keeping the gaming operation open for business for a minimum period of time or days;
d. The hiring, firing, training or promotion of employee;
e. The maintenance of the gaming operation's books and records, generation of required financial reports or statements, and implementation and frequency

of audits;

f. Providing or supervising security personnel;

g. Conducting advertising at specified minimum levels;

h. Promptly paying operation bills as they come due; and

i. Maintaining food and beverage services.

3. The contract must have a fixed limited time to run which must be specifically stated. The contract term shall not exceed five (5) years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. Under no circumstances shall the contract exceed seven (7) years.

4. For contracts longer than five years duration, the opportunity for renegotiation or other provision for adjustment shall arise no later than five years after the contract is entered, and include a determination of the extent and investment necessary to justify a term longer than five years duration. The renegotiated compact shall state expressly that certified independent audits were submitted and received by the Tribe. Copies of the required independent audits for the past five (5) years shall be included as part of the renegotiated contract.

5. The contract must specify the amount of the contractor's fee or reimbursement, as well as specify the method used to compute the fee.

6. The contract must specifically identify any contingent matter or condition intended to be a part of the contract including any written or unwritten collateral agreements relating to the gaming operation. The contract must state that it represents the entire agreement of the parties.

7. The contract must include, or have attached, a list of all parties as defined in section H.1.

8. The contract must identify the person/office responsible for employment and personnel matters, and indicate whether Indian preference in employment will

apply to the activity. The contract should clearly set forth whether the employees are employees of the contractor or of the tribe. If they are tribal employees, the contract should indicate whether or not the tribal personnel policies will apply to employees of the gaming operation.

9. Although not required, the contract should indicate how law enforcement and fire protection services will be provided to insure the public's safety.

10. The contract shall specifically state whether assignments or subcontracts will be permitted. If so permitted, the contract shall provide that no assignment or subcontract will be valid until approved by the Secretary or his authorized representative in the BIA. Assignments or subcontracts submitted for approval shall include a list of all parties in interest as defined herein in Section H.1, who shall be required to submit to a background investigation.

11. The contract shall state that approval of any assignment or subcontract to any new party or entity must be preceded by a complete background investigation of such person or entity.

12. Assignments, subcontracts, transfers of interests, or any other transaction resulting in a change in the parties in interest to the contract must be submitted for approval as an amendment to the contract.

13. No contract, equipment lease, subcontract, assignment or agreement relating to gaming shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in the contract.

14. A contract for lease or purchase of gaming equipment shall state that such equipment has been tested, approved or certified by a designated gaming test laboratory and conforms to such technical requirements and standards as may be specified by the State in which the contractor is operating or by the State of Minnesota, Nevada, New Jersey or South

Dakota.

15. A lease or agreement for gaming equipment shall clearly set forth the responsibility for servicing, maintenance and replacement of equipment including a designation of the party to be responsible for insurance coverage.

16. The lease or agreement for gaming equipment shall specify the fee to be paid to the lessor, manufacturer or distributor and the method used to compute the fee.

17. Prior to the installation of any gaming equipment acquired by the tribe, the tribe shall require the lessor, manufacturer or distributor to provide sufficient information and identification to permit the State or a contracted agency to conduct a background investigation as required by subsection B of Section H.

18. The contract shall require the contractor to obtain public liability insurance of sufficient coverage per person and per occurrence for the gaming operation. The contractor shall be further required to obtain insurance on the buildings, improvements and contents thereof for their full replacement value against any loss or damage. The contractor shall be required to supply to the tribe and the Area Director, prior to the opening of the gaming facility, written evidence of the required insurance coverage.

19. The conflict of interest provisions contained in Section F on members of the tribal government shall apply to situations in which a lease or other agreement is proposed in relation to gaming equipment lease or purchase.

D. Financial and Accounting Requirements

1. The contract shall require:

(a) The contractor to furnish the tribe, on at least a monthly basis, verifiable financial reports showing the revenues and expenses of the gaming operation and

shall provide that an independent audit by a certified public accountant acceptable to the tribe will be performed at least annually.

(b) The establishment of adequate accounting procedures to insure that books of account will be maintained and financial statement prepared in accordance with generally accepted accounting principles.

(c) The books of account and financial records to be maintained on or near the reservation to allow access by the tribe. The tribe shall have a right to inspect the books of account and records at all reasonable times, including during gaming business hours to verify daily gross receipts and income, and to secure an independent audit of the contractor's books of accounts and financial operations as deemed necessary by the tribe.

2. The contract shall specify operating expenses and costs and provide a method, approved by the tribe, for determining which non-enumerated expenses will be allowed as operating costs.

3. The contracts shall provide for a minimum guaranteed payment to the tribe on at least a monthly basis which shall take priority over retirement of development and construction costs. The amount and frequency of the guarantee payment to the tribe shall at a minimum bear a reasonable relationship to the financial projections for the gaming operation and the economic experience of similarly situated tribal gaming operations or comparable businesses, to the extent such information is available. The contract shall specify the tribal official to whom, or the bank account where, the tribe's portion of the proceeds will be paid, consistent with the tribe's constitution and bylaws, tribal ordinances or other documents.

4. The contract shall set forth the upper limit on the amount of development, equipment, construction and start-up costs which shall be repaid to the contractor. The method for repayment of funds provided by the contractor, rates of interest, the timeliness and the

priorities for repayment of each item of financing should clearly be set forth in the contract or in exhibits attached to the contract.

5. The contract shall require the establishment of a cash management system adequate to safeguard the funds of the operation and will provide that the tribe shall have the right to oversee the system, including video surveillance.

6. The contract shall specify the amount of the contractor's fee and the method used to compute the fee. If the fee is to be based on a percentage of the net revenues of the gaming operation, such fee shall not exceed 30 percent; fee arrangements that propose to exceed 30 percent of the net revenues may be approved if the Area Director is satisfied that a very substantial capital investment on the part of the contractor, substantial to be judged depending on such factors as the size, cost, location of the proposed facility, is required, and income projections for such gaming activity require a higher fee. In no event may the fee exceed 40 percent of the net revenues of the gaming operations.

7. The contract shall state that provisions of the Internal Revenue Code of 1986, as amended, (including sections 1441, 3402(q), 6041 and 6050 I, and Chapter 35 of such code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations will be the responsibility of contractor.

E. Termination

1. The contract shall clearly set out the grounds and procedures for termination of the contract including but not limited to management contractor's breach of contract or loss of a tribal gaming license. Other reasons for termination may include such causes as contractor's insolvency or bankruptcy, conviction of a

crime involving any aspect of the gaming operation or moral turpitude, misrepresentations, and breach of warranties. The actual termination shall not require the approval of the Area Director but notice of the termination should be provided to the Area Director or an appropriate Bureau official within ten (10) days after the termination.

2. The termination provisions should clearly specify the disposition and ownership of the assets upon termination, including the balances in any of the funds which may be created by the contract.

3. The contract shall have a provision for dispute resolution preferably through a private procedure such as arbitration. A provision apportioning costs of arbitration should be included. The contract should indicate the court with jurisdiction to adjudicate any dispute which cannot be resolved by arbitration, including adjudication of liability and disposition of assets on breach and termination.

4. The contract should indicate whether the tribe waives its immunity with respect to disputes and/or suit to allow the full enforcement of the terms and conditions of the contract and whether there is a cap on that liability.

5. The contract shall provide that any subsequent conviction of any felony or misdemeanor offense shall be grounds for immediate termination of the contract. Further, evidence that a contractor - directly or indirectly - attempts to interfere unduly or to influence any decision or process of the tribal government shall also be grounds for termination of the contract.

F. Conflict of Interest Provisions

1. The contract shall provide that the contractor will not unduly interfere with, or attempt to influence the internal affairs or government decisions of the tribe for its gain or advantage.

2. The contract shall provide that no payment or

thing of value may be made to any member of the tribal government official, relative of any tribal official, or tribal government employee for the purpose of obtaining any special privilege, gain, advantage or consideration for the contractor. The contract shall certify and state that no such payments have been or will be made in the future.

3. The contract shall state that no member of the tribal government, or relative in the immediate household of a member of the tribal government, may be an employee of the contractor or of the gaming operation. For purposes of this section, relative means an individual who is related as a father, mother, son, or daughter. This requirement as it applies to a relative may be waived in writing by the Area Director in appropriate circumstances.

4. The contract shall state that no party in interest, as defined herein in Section H.1, will be an elected member of the tribal government, or relative of an elected member of the tribal government. The contract shall further provide that no elected member of the tribal government or relative of an elected member of the tribal government shall have any indirect or direct financial interest in the gaming operation.

5. As used in this section, the term "member of the tribal government" means the tribal council or governing body including any independent board or body created to oversee any aspect of gaming and any tribal court official.

G. Leasing Requirements

1. The contract shall be consistent with any requirements related to the lease of trust land. If no related lease is submitted, the contract should be examined to determine whether the relationship between the parties, as described, will require a lease. If a lease is required, the tribe will be advised to submit a

lease for review and approval. Leases are to be reviewed pursuant to the provisions of 25 C.F.R. Part 162.

2. A lease shall not include provisions that involve gaming management except as necessary to conform a lease to a management contract.

H. Parties in Interest/Background Investigations/Criminal Checks

A. Parties in Interest:

1. As used in this section, "parties in interest" includes any person or entity (including individuals comprising such entity) having a direct financial interest in, or responsibility for, the management of the gaming operation, including investors, lenders, general and limited partners, corporate officers and directors, all stockholders who hold (directly or indirectly) at least 10 percent of the stock of any corporation which is a party to the contract, and all key employees who will have day to day management responsibility for the gaming operation.

2. Parties in interest also includes any person or entity holding a direct or indirect financial interest in a lease or purchase agreement for the leasing or purchase of gaming equipment.

B. Background Investigations: The requirements for background checks/investigations shall consist of two parts: 1) a background investigation conducted by the tribe on each party in interest having a direct or indirect financial interest in, or management responsibility for, a gaming operation and 2) a criminal history check which shall be compiled by the Division of Law Enforcement Services (DLES) of the Bureau of Indian Affairs (BIA), Washington, D.C.

1. The tribe, prior to entering into a contract shall obtain sufficient information and identification from each party in interest to perform a background

investigation, for the purpose of determining the suitability of such persons for employment in a gaming operation. This information shall be provided in writing to the respective State licensing or regulatory agency or other independent/private agency authorized to conduct background investigations. The tribe shall contract with such an agency to conduct the check. The tribe may require the contractor to post a bond to cover the cost of the background investigation. The tribe shall require, at a minimum the following information:

(a) The full name, any other names used, date and place of birth, citizenship, social security number, drivers license numbers and physical description; and

(b) The dates and places of residence for the past ten years, dates and places of employment and or business including the positions held or types of work engaged in for the past ten years; and

(c) The current business and residence telephone numbers; and

(d) The names and current addresses of at least three personal references who are acquainted with the person during each period of residence or business listed under subparagraph (b) of this section; and

(e) A description of any previous or ongoing gaming or business relationship with any Indian tribe; and

(f) A description of any previous business relationship with the gaming industry generally including the name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit relating to gaming and the status of the application.

(g) For each felony charge, conviction or pending felony prosecution, the charge including any gaming related charges, the name and address of the court involved, and the date and disposition; and

(h) For each misdemeanor charge, conviction or pending misdemeanor prosecution, including any gaming related charges, within 10 years of the date of the contract, the name and address of the court

involved, and the date and disposition; and

(i) A credit bureau report and financial statement disclosing all assets, liabilities and financial interests for each of the past ten years on each person listed as a party in interest; and

(j) Any other information a tribe deems applicable and relevant.

(k) For a party in interest described in subsection A.2, a list of all states in which the lessor, manufacturer, or distributor is licensed to manufacture or distribute gaming equipment, the license numbers, if issued and the operative dates of the license(s).

2. Criminal history data on all parties in interest shall be compiled by the BIA DLES, Washington, D.C. Criminal history information required under this section shall consist of two parts: fingerprints and personal data.

(a) The tribe shall obtain a current set of fingerprints on each party in interest using form FD-258, Applicant Fingerprint Card, which shall be transmitted to the BIA DLES, Washington, D.C. for referral to the Federal Bureau of Investigation (FBI) Fingerprint Identification Division.

(b) In addition to the fingerprint card, the tribe shall require each party in interest to submit personal information indicating the full name(s), any other names used, date and place of birth, citizenship, social security number, drivers license number and physical description. Personal information submitted shall be transmitted to the DLES, Washington, D.C. for referral to the FBI Information Management Division. The Area Director may require any potential party in interest to pay the cost of the criminal history check.

(c) Results of the fingerprint and name check shall be reported in writing to the Area Director as soon as such results are received from the FBI. The Area Director shall notify the tribe of the results as soon as possible.

3. Before a contract is approved, the tribe shall forward a copy of the background investigation results

conducted pursuant to this section to the Area Director.

4. If the Area Director receives additional information raising issues as to the suitability of any parties in interest to participate in the gaming, and the background check results are not dispositive of the issues, the Area Director shall request the tribe to conduct a more thorough check of the parties in question. If the Area Director determines that any false statement was made by the parties in interest by providing false information or the parties in interest have acted in any manner that may be interpreted as a violation of federal law, the Area Director shall refer that information to the appropriate office of the FBI.

5. The Area Director shall forward a copy of the background investigation results to the DLES, Washington, D.C.

6. Whenever there is any change in the "parties in interest," the tribe shall have a background check immediately conducted consistent with these guidelines and forwarded to the Area Director. The Area Director will not approve any contracts when there is a change in the parties in interest until the background check is completed.

I. Review Process

1. Upon receipt of a tribal request to review a contract, lease, subcontract, assignment or other agreement related to gaming, the Superintendent shall transmit the documents in a timely manner to the Area Director for review and approval. Before transmitting documents to the Area Director, superintendents will insure that all the information required by Section H, subsection B. 1. (a) through (k) relating to background investigations has been completed.

2. The Area Director will designate in writing an employee position to receive the background check information and to provide recommendations to the

decision makers on the suitability of the potential contractors. The Area Director will notify the DLES, Washington, D.C., of the designated employee position. If the position is vacant, the position's Supervisor shall automatically receive background checks and provide recommendations.

3. The Area Director shall acknowledge receipt of the documents in writing, to the tribe and the contractor in a timely manner.

4. If the Area Director determines that a contract submitted does not conform to the requirements of the guidelines or the IGRA, the Area Director shall provide written notification to the tribe of needed modifications. If modifications sufficient to bring the contract into compliance with these guidelines cannot be accomplished, the contract shall be disapproved. If the contract is disapproved, the tribe shall be informed in writing of the reasons for disapproval. In no case or under any circumstance shall conditional approval be granted during any period in which the parties are modifying the contract to bring it into compliance with the guidelines.

5. Compliance with the National Environmental Policy Act shall be required before any contract, lease, subcontract, assignment or agreement is approved.

6. A contract is ready for a final decision approving it only after the contract complies with all of the guidelines in this memorandum and the Area Director has received the background investigation results and the FBI criminal history checks. The Area Director shall issue an approval or disapproval in writing within 15 working days of receipt of all information necessary to issue a decision on the contract.

7. A disapproval shall be in writing and shall state the grounds for the disapproval. The Area Director shall not approve any contract if the Area Director determines that:

(a) Any of the principals are persons described in 25 U.S.C. § 2711(e) (1)(A) or (D);

(b) The tribe or the parties in interest have deliberately or substantially failed to comply with the requirements of the guidelines and federal law; or

(c) Any person listed as a party in interest has been convicted of any felony or misdemeanor involving fraud, misrepresentation or gambling offense; or

(d) Any person listed as a party in interest has provided materially false statements and information or has refused to comply with a reasonable request for additional information; or

(e) Any person listed as a party in interest has, or has attempted to unduly interfere or influence for his/her gain or advantage any decision or process of tribal government relating to gaming;

(f) The contract is not in the best interest of the tribe; or

(g) Class III gaming is being conducted without a tribal-state compact; or

(h) The contract fails to meet the requirements of 25 U.S.C. § 2711(b) or the guidelines.

8. The approval by the Area Director shall state that the Secretary may withdraw approval of the contract, lease, subcontract, assignment or agreement at any time, if the Area Director concludes that the parties in interest are unsuitable or that the parties are otherwise violating the IGRA.

9. Copies of approved contracts shall be sent by the Area Directors to the local FBI office, the Indian Gaming Management Office in Washington, D.C. and the NIGC.

J. State-Tribal Compacts

1. All Class III tribal-state compacts shall be simultaneously transmitted by the tribes with the original to the Assistant Secretary - Indian Affairs and a copy to the local Area Office. A resolution or other statement authorizing the tribal signatory to enter into

the compact shall accompany the compact.

2. The Area Director shall notify all tribes of the above requirement.

3. Upon receipt of a negotiated tribal-state compact, the Area Director shall immediately transmit the following information:

(a) The compact is signed by a duly recognized tribal signatory authorized to sign the compact; and

(b) The compact is signed by the Governor of the State or his/her representative; and

(c) A tribal resolution authorizing the compact and the gaming activity is included and is in conformance with the tribe's governing documents and/or process; and

(d) A copy of the tribal constitution and/or other governing document is attached; and

(e) If a lease of trust land is involved, a copy of the environmental assessment conducted and the results.

(f) A copy of the approved management contract, if available, should also be included with the compact documents.

(g) A copy of the tribal ordinance, if available, should also be included.

4. The Area Director shall certify that no other issues exist which impact or affect the gaming operation. If there are other issues the Area Director shall provide an explanation with any backup documentation as may be available.

5. The Assistant Secretary - Indian Affairs shall approve or disapprove a tribal-state compact before the date that is 45 days after the date on which the compact, including an appropriate resolution authorizing the tribal signatory to enter into the compact, is received in the Central Office.

6. A tribal-state compact shall become effective only when notice of approval by the Assistant Secretary-Indian Affairs has been published in the Federal Register.

7. The Assistant Secretary-Indian Affairs may

disapprove a tribal-state compact if the proposed compact violates any provision of the IGRA or any other provision of federal law, as may be applicable or the United States' trust obligations.

K. Per Capita Plans

The provisions in this Section are not required to be part of any contract or agreement relating to the management of a gaming operation. However, as a general matter, any tribe considering gaming should be notified of the requirements under the Indian Gaming Regulatory Act.

1. The Area Director shall provide written notice to any tribe involved in, or desiring to engage in gaming, of the requirements relating to the distribution of net revenues from any gaming activities. The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(b) (3) provides:

> Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if --
>
> **(A)** the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
>
> **(B)** the plan is approved by the Secretary as adequate particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B); (clause (i) or (iii) of paragraph (2)(B) provide that net revenues from any tribal gaming are not to be used for purposes other than to fund tribal government operations for programs and to promote tribal economic development);
>
> **(C)** the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are

disbursed to the parents or legal guardians of such minors or legal incompetents in such amounts as may be necessary for the health, education or welfare of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

2. At a minimum, distribution plans shall be consistent with the purposes established by the IGRA and can include property, housing subsidies, welfare payments, scholarships and other social program payments to tribal members. The distribution plan must provide for payments to tribal members in a uniform and fair manner to eliminate complaints of discrimination.

3. Children may not be excluded from per capita distributions. However, tribes can establish programs with objective criteria which authorize distributions to certain groups, such as scholarship funds for college students, welfare assistance for the needy, or subsistence payments to the elderly. Such programs should be ongoing programs with rational, objective standards. These programs would not be considered to be per capita distributions.

4. Tribes must establish separate accounts for gaming revenues because of the taxable nature of those funds to individuals.

5. If Area Directors become aware of per capita distributions without an approved plan, they should take appropriate action including referral to the Office of the Solicitor for consideration of possible legal action.

L. Additional Requirements

1. The Area Director should also notify tribes involved in gaming or considering gaming of the

Secretary's existing requirements, and the requirements of the Indian Gaming Regulatory Act, for acquisition of off reservation lands for gaming purposes.

2. To the extent that any provision of these guidelines are inconsistent with the IGRA, such provisions shall be superceded by such applicable IGRA provisions.

3. Class III contracts are governed by these guidelines and approved Class III tribal/state compacts. In the event that the tribal/state compact and the guidelines conflict, the compact shall supercede the guidelines. Review and approval will be conducted by the Area Director. This approval shall not be delegated.

4. Any allegation concerning a crime involving gaming in any way shall be routed through the Assistant Inspector General for Investigations, Office of the Inspector General, 1550 Wilson Blvd., Suite 402, Arlington, VA. 22209. That office shall make the formal referral to the proper authorities.

THE SECRETARY OF THE INTERIOR

WASHINGTON

February 28, 1992

MEMORANDUM

To: Solicitor
Assistant Secretary - Indian Affairs
Assistant Secretary - Policy, Management and Budget
Counselor to the Secretary
Chairman, National Indian Gaming Commission

From: Secretary *s/s*

Subject: Directive on Indian Gaming Management

In a December 12, 1991, memorandum, I established a Task Force on Indian Gaming Management. The Task Force was assigned to review and analyze a number of gaming issues. It was to recommend such changes as may be necessary to preserve Indian gaming as an economic activity, to assure adequate protection of the general public and tribal communities from undesirable elements of gaming, to develop better coordination between the Department of the Interior and the Department of Justice, to alleviate law enforcement risks involved with gaming, and to develop a coordinated approach to the transfer of certain gaming functions and responsibilitiues to the National Indian Gaming Commission (NIGC). The Task Force was to consider tribal, state and Federal government concerns and comments relative to the issues of gaming on Indian lands.

Based on the Task Force recommendations, I conclude that the actions which are listed below must be taken. These actions are intended to assure that tribes can maintain gaming as a viable economic enterprise while implementing controls. Your offices are to consider implementation of the following directives to be a high priority. You should report to me on the status of the implementation within a month from the date of this memorandum.

ENFORCEMENT

A. The Assistant Secretary for Indian Affairs (A/S-IA) is to instruct Bureau of Indian Affairs (BIA) Area Directors and Superintendents on the revised Departmental policy and on the new guidelines for approval of contracts. The importance of full compliance, particularly NEPA analysis, must be underscored.

B. The A/S-IA is to determine how many unauthorized games are being conducted and send a cease and desist letter to related tribal councils. He shall

further state that unless unauthorized games are stopped, including gaming operations conducted under unapproved contracts, legal action in the form of civil injunctions will follow. A period for submission of contracts, with money to operators being paid into escrow accounts, will be allowed.

C. The A/S-IA will initiate actions necessary to shut down, as soon as possible, all games and gaming operations which are operating without an approved contract.

D. The A/S-IA, through the Solicitor, will recommend to the Attorney General vigorous criminal prosecution of crimes involving gaming.

E. The A/S-IA will establish a regulatory unit, called the Indian Gaming Management Office, within the BIA to oversee gaming contractors, their background checks applications, the approval of per capita plans, tribal/state compact approvals, off-reservation trust acquisitions for gaming purposes, and the transition to the NIGC. The aforementioned office should also:

1. Devise a curriculum and conduct training of local Area Directors and BIA personnel.

2. Have responsibility to implement all of the directives in this memorandum except those within the purview of the Office of the Solicitor, and report through the A/S-IA on the status of their implementation to me.

F. The A/S-IA will devise a curriculum and conduct training *every year* for tribal personnel, including law enforcement personnel, in financial accounting, detecting gaming fraud, and surveillance.

G. The A/S-IA and the Assistant Secretary for Policy, Management and Budget (A/S-PMB) will develop criteria and procedures for the Department to withdraw approval of management contracts.

INVOLVEMENT OF FBI AND DOJ

A. The A/S-IA will impress upon BIA officials in the field that, with respect to Indian gaming regulations, the FBI is generally a reactive agency; i.e., in most instances, it investigates allegations that it receives from a tribe, BIA official or private citizen.

B. The Solictor will establish a coordinating process with the Attorney General's Subcommittee on Indian Affairs to insure a consistent policy on legal issues.

C. The Solicitor will expedite the development of a Memorandum of Understanding between the FBI and the BIA concerning a coordinated law enforcement approach to Indian gaming offenses.

REVIEW OF ADMINISTRATIVE GUIDELINES ON GAMING CONTRACTS

A. The A/S-IA will require strict adherence to the Indian Gaming Regulatory Act (IGRA) requirements through the issuance of an interim policy including the requirement that tribal ordinances be submitted along with contract documents.

B. The A/S-IA will initiate actions to withdraw conditional approvals in cases where there are clear indications that IGRA requirements are being violated and will require tribes to comply with the statutory requirements of the IGRA.

C. The A/S-IA will develop a system for follow-up and monitoring of gaming operations not in compliance with IGRA requirements and Departmental policies and establish a grace period (up to six months) within which tribes will be required to comply. Consequences or sanctions for not complying can include termination of gaming activities and referral to the Department of Justice for civil and criminal prosecution.

D. The A/S-IA and the A/S-PMB will revise and reissue administrative guidelines pending the transfer of responsibilities to NIGC.

E. As part of the revised guidelines, a model management contract and checklist to insure that the statutory requirements of IGRA are included in management contracts will be developed by the A/S-IA.

BACKGROUND CHECKS

The A/S-IA will take actions which, with respect to background checks:

A. Require adherence to IGRA requirements;

B. Where appropriate, enable BIA law enforcement to access other background checks done by states or the FBI for other tribes or state licenses;

C. Have contractors pay for an expanded check;

D. Require credit checks;

E. Require more in depth checks for selected contractors;

F. Seek investigative assistance from State Gaming Commissions and other Federal, State and local agencies;

G. End conditional approvals of management contracts;

H. Revise and reissue administrative guidelines which incorporate the above recommendations; and

I. Have the BIA law enforcement central office establish a central file of all background checks requested and completed, with periodic status reports to the Indian Gaming Management Office in BIA and the Associate Solicitor, Indian Affairs.

PER CAPITA DISTRIBUTION PLANS

The A/S-IA will take actions which:

A. Establish a grace period within which gaming tribes will be required to come into compliance with IGRA requirements;

B. Develop guidelines to insure adherence to IGRA requirements. At a minimum the guidelines should include a requirement that distributions to individuals be in line with the purposes authorized, such as, property, housing subsidies, welfare payments, scholarships and other social program payments to tribal members in a uniform and fair manner. Central office staff should develop the guidelines with review and input from Area and field staff;

C. Develop regulations to govern gaming revenue distributions; and

D. Inform tribes that per capita distributions are taxable and work with the Department of Treasury and the IRS to insure notice to tribes of income tax laws, particularly reporting requirements.

APPROVAL PROCESS FOR TRIBAL-STATE COMPACTS

The A/S-PMB will revise a Secretarial order for reissue to delegate authority to the Assistant Secretary-Indian Affairs for approval of tribal-state compacts. Responsibilities related to approval of tribal-state compacts should continue in the BIA, with Solicitor office review.

The A/S-IA will:

A. Develop and issue a policy directive on standards of review and procedures to insure approval of tribal-state compacts; and

B. Move to bring tribes currently operating Class III gaming without tribal-state compacts into compliance with IGRA requirements.

LANDS INTO TRUST FOR GAMING

A. The BIA will complete and publish the proposed trust acquisition regulations no later than April 1, 1992. In the interim, when considering requests by tribal governments to take off-reservation lands into trust for the purpose of establishing an Indian gaming enterprise and until final trust acquisition regulations (25 CFR Part 151) are published, the BIA shall follow the provisions of the IGRA and the existing regulations found at 25 CFR Part 151. Pursuant to the IGRA, consultation with local, state, and tribal government officials is required. Guidelines to implement consultation requirements shall be developed and followed by the BIA. If appropriate, further revisions to the trust acquisition regulations should be considered to incorporate the IGRA requirements.

APPROVAL OF LEASES INVOLVING GAMING ACTIVITIES

A. The A/S-IA will direct field staff that gaming leases are not to be approved if they contain provisions that should properly be included in management contracts.

B. The A/S-IA will review the lease cancellation provisions of 25 CFR 162 to determine the means of providing more protection to Indian lessors.

TRANSITION OF FUNCTIONS TO THE NIGC

The Counselor to the Secretary will establish a working group representing the Commission, the A/S-PMB, A/S-IA and the Solicitor's Office, to monitor implementation of the short and long range goals listed above, including effectuating a smooth transition to the NIGC of those responsibilities it has under the IGRA.

cc: Inspector General
Department of Justice

Supreme Court, U.S.
FILED
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No. 93-452

IN THE

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OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Sioux Manufacturing's Articles Of Incorporation Cannot Be Used To Obviate The Need For Exhaustion Of Tribal Remedies.

Respondent, Altheimer & Gray ("Altheimer"), in its Brief in Opposition advances an additional (or alternative) theory which the Seventh Circuit did not address on the question of whether an exhaustion of tribal remedies was required. The Seventh Circuit relied on the Letter of Intent and found a waiver by the Devils Lake Sioux Tribe

("Tribe") of the requirement of exhaustion. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), Pet. App. 20. Now, Altheimer adds the Articles of Incorporation ("Articles") of Sioux Manufacturing Corporation ("Sioux Manufacturing") as an additional basis to support the Seventh Circuit's decision. Resp. Brief 9, 13, citing Articles § 4.2.2, Pet. App. 53. This theory is neither factually nor legally supportable.

Whether or not a waiver can be gleaned from the actions of officials of Sioux Manufacturing, as evidenced by the Letter of Intent, or from the actions of the Tribe's governing body, as evidenced by the Articles, the underlying question remains the same: whether Congress intended the diversity statute to permit a federal court in the first instance to interject itself into interpreting and construing tribal law and the actions of tribal officials in matters which admittedly involve tribal self-government, self-determination and economic development within that tribe's reservation. Altheimer has not pointed to (because it cannot) any authority which would indicate that Congress intended to permit such an intrusion on tribal sovereignty by a federal diversity court. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

Further, even if a federal court would interpret and construe tribal law (which it should not) the Articles and the Letter of Intent cannot under any reasonable interpretation and construction be said to have waived the requirement of exhaustion of tribal remedies. The Devils Lake Sioux Tribal Law and Order Code ("Tribal Code") treats the "requirement of exhaustion of tribal remedies" separately from that of sovereign immunity. *See* Tribal Code §§ 2-2-103 and 2-2-104, Pet. App. 49-50. There is, however, no specific provision within the Articles indicating an intent by the Tribal Council to deal directly with the re-

quirement of exhaustion or to specifically limit tribal court jurisdiction. Absent such language, the Articles cannot be found to restrict tribal court jurisdiction or to waive the requirement of exhaustion. *Cf. Brown v. Washoe Hous. Auth.*, 835 F.2d 1327, 1329 (10th Cir. 1988) (before a federal statute can be said to limit the presumptive jurisdiction of the tribal court an express congressional command to that effect is necessary). The provisions which Altheimer points to in the Articles and the Letter of Intent deal with sovereign immunity, but there is no unequivocal expression of intent therein to waive the separate requirement of "exhaustion." Resp. Brief 13, citing Articles § 4.2.2, Pet. App. 53, and Letter of Intent ¶ 9, Pet. App. 62-63. In addition, there is no expression of intent to extend the application of those provisions to a stranger to a contract, which is what Altheimer asks.

Finally, and perhaps more importantly, the Articles specifically disclaim any intent by the Tribal Council to consent to the jurisdictional authority of any government other than the Tribe with regard to the affairs of Sioux Manufacturing. The charter provides that

> [n]othing in these Articles of Incorporation nor any action of the Corporation shall be deemed or construed . . . to be a consent of the Tribe to the jurisdiction of the United States or of any state or any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation or the Tribe . . . .

Articles § 4.2.4, Pet. App. 54. Proper respect for tribal sovereignty requires that this limitation be respected and explicitly followed in determining whether there was a forfeiture of the tribal court's exclusive jurisdiction.

Thus, the additional theory advanced by Altheimer and the reasoning following by the Seventh Circuit are both

in conflict with federal policy and the decisions of this Court promoting direct, independent and exclusive authority of tribal courts over reservation commercial disputes. They are also contrary to tribal law.

2. Altheimer Misstates The Holdings Of The Ninth And Eighth Circuits On The Application Of The Tribal Exhaustion Rule.

In an attempt to create an appearance of an absence of conflict within the Circuits, Altheimer misstates the holdings of the Ninth and Eight Circuits. Resp. Brief 9-11. The Ninth Circuit in *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992), rejected the procedure followed by the Seventh Circuit in this case. As the Ninth Circuit's *en banc* decision expressly noted, resolution of the dispute in *Taylor* required interpretation of tribal legislative intent as a part of resolving whether the action was "barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation." 964 F.2d at 920. Because of this and other questions of tribal sovereignty presented by the case the Ninth Circuit held:

> that the district court correctly ruled that it *was required to abstain* from exercising its diversity jurisdiction over this tort action until the Colville Tribal Courts have resolved the substantial questions of tribal sovereignty presented by the facts in this case.

Id. (emphasis added). Contrary to Altheimer's contentions, this holding conflicts with the Seventh Circuit's decision sanctioning federal district court interpretation and construction of tribal law prior to and as a part of determining whether to abstain. *Altheimer*, 983 F.2d at 812, 815, Pet. App. 15-16, 20.

Also, Altheimer is incorrect in its representation that the Eighth Circuit's decision in *United States ex rel. Kishell*

v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987) is not in conflict with the Seventh Circuit's decision in this case. Resp. Brief 10. In *Kishell*, the Eighth Circuit concluded that the district court correctly refused to exercise federal jurisdiction based on diversity of citizenship because of the "Supreme Court's opinion in *Iowa Mutual* and *National Farmers*." 816 F.2d at 1277. Moreover, the Eighth Circuit then held that the defense of tribal sovereign immunity should not be considered by a federal diversity court "unless and until it has been initially established that the case is properly before the federal court." *Id.* at 1277 n.3. In conflict with *Kishell*, the Seventh Circuit here interpreted and construed tribal law and resolved the sovereign immunity issue prior to considering whether to abstain. *Altheimer*, 983 F.2d at 812, Pet. App. 15-16.

Finally, Altheimer is disingenuous when it asserts the Ninth Circuit "said nothing about 'judicial self-restraint' " in *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992). Resp. Brief 11. In fact, the express basis for the Ninth Circuit's holding that a federal court should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law, was the "principle of judicial self-restraint" as delineated by the Supreme Court's decisions in *Iowa Mutual*, *National Farmers Union* and *Santa Clara Pueblo*. *Plainbull*, 957 F.2d at 728. Accordingly, contrary to Altheimer's misstatements, the Seventh Circuit's approach, in resolving the merits of the section 81 voidness issue first and its use thereafter of that decision as its very basis for not requiring an exhaustion of tribal remedies, is certainly in conflict with the principles of judicial self-restraint formulated by the Supreme Court and adhered to by the Ninth Circuit in *Plainbull*.

3. The Authority Which Altheimer Cites Does Not Support The Seventh Circuit's Departure From And Conflict With This Court's Directives Against Implying Waivers Of Sovereign Immunity.

Altheimer in its Brief in Opposition cites to the Court three lower court decisions in an attempt to justify the Seventh Circuit's decision to imply, for Altheimer's benefit, a waiver of sovereign immunity. Resp. Brief 15. The cited cases are distinguishable because each involved a claimant who was an actual contracting party and there existed an express intention to give the claimant itself a direct right to compensation and the ability to enforce that right against its fellow contracting party. *See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670 (8th Cir. 1986); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1440 (D. Idaho 1987); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974), aff'd, 517 F.2d 508 (8th Cir. 1975).

In stark contrast, the claimant in the present case, Altheimer, is not a signatory to the Letter of Intent under which it seeks the benefit of a waiver of sovereign immunity. Rather, Altheimer is a stranger to that agreement. Altheimer cites to nothing which would reflect an express and unequivocal intention on the part of the Tribe or Sioux Manufacturing to give a stranger to the Letter of Intent a direct right to compensation or the ability to enforce that right against Sioux Manufacturing.

Accordingly, Altheimer has failed to cite to this Court any decisional authority to justify the Seventh Circuit's departure from and conflict with the clear directives of this Court, which require that a waiver of sovereign immunity must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *United States v. United States Fidelity &*

Guaranty Co., 309 U.S. 506, 513 (1940). *See also* Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52.

4. The Seventh Circuit's Decision In *Wisconsin Winnebago Business Committee v. Koberstein* Further Exemplifies The Seventh Circuit's Departure From This Court's Application Of Section 81.

Altheimer is correct when it describes the Seventh Circuit's opinion in this case as following the principles first articulated by that court in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985). Resp. Brief 23, 28. The *Koberstein* decision, however, does not reveal support for limiting the application of section 81 to "land transactions." Instead, it reveals the beginning of the Seventh Circuit's departure from following the plain language of section 81 and the protective principles pronounced by this Court in *Green v. Menominee Tribe*, 233 U.S. 558 (1914).

In *Koberstein*, the Seventh Circuit criticized this Court's decision in *Green* as being "ancient" and as dealing with section 81 in a "cursory fashion." *Koberstein*, 762 F.2d at 617. The Seventh Circuit further criticized *Green* for not providing a "detailed explanation of why the statute applied," although it did acknowledge that section 81's application was triggered in *Green* because the dispute involved a "contract between an Indian tribe and a trader for supplies to be used in logging Indian land." *Koberstein*, 762 F.2d at 617.

In light of that criticism, it is telling that there is not even an acknowledgement of the *Green* decision in the Seventh Circuit's opinion in this case (although Sioux Manufacturing brought that case to the Seventh Circuit's attention in its briefs and at oral argument). What the Seventh Circuit began in *Koberstein* was extended further in this case: a complete rejection of the plain lan-

guage of section 81, as well as this Court's recognition of the broad protective breadth of that statute.

Contrary to Altheimer's averments, petitioner does not advocate nor do the facts of this case suggest a far-fetched or limitless interpretation of section 81. Resp. Brief 24-28. It is an attorney (Altheimer) here who alleges the agreement calls for the payment of monies and the granting of special privileges by an Indian tribe to the attorney. The district court found that the agreement offered by the attorney was, based on its plain language, "inextricably rooted in a planned transaction regarding Indian land." Pet. App. 40.[1] The broad protective language of section 81 was admittedly intended to specifically protect Indian tribes from exploitation by attorneys and claims agents. Cong. Globe, 41st Cong., 3d Sess. 1483-87 (1871). The concern for exploitation by attorneys is no less real today than in 1871 when the statute was originally enacted. In fact, it is the reality of that concern in matters which go beyond Indian tribes which the public has justifiably relied upon to demand increased regulation and accountability of attorneys.

There is certainly nothing onerous here about construing section 81 to require an attorney (Altheimer) to comply with federal law. If Altheimer desired to insure a contractual remedy to receive compensation from an Indian tribe which it opposed, it should have complied with the form and manner of execution requirements of section 81. As in *Green*, the contractual dispute in this case clearly falls "within the spirit of the statute and so exemplifies

[1] Altheimer, in an attempt to undercut this finding, tries to create an appearance of ambiguity by offering matters outside of the written agreement. Resp. Brief 3-4, 19-20. However, Altheimer's claim is based on the Letter of Intent and it is the plain language of that document which the district court properly found tied the contract to Indian land. Pet. App. 24, 31-32, 36, 40.

the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered." *Green*, 233 U.S. at 569.

The importance and substantiality of the section 81 issue has not been denied by Altheimer. Resp. Brief 24-28. To the contrary, Altheimer and Amicus acknowledge that the question has far-reaching implications for Indian tribes. *Id.* Amicus Brief 19-20. Accordingly, petitioner requests that review be granted.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, this Court should grant petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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No. 93-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

It has today come to our attention that the United States Congress has recently passed legislation, the **Indian Tribal Justice Act,** and presented the same to the President of the United States on November 23, 1993 for signature. H.R. 1268, 103d Cong., 1st Sess., 139 Cong. Rec. H10259, S16596 (1993). This legislation and particularly Congress' findings made as a part thereof delineate important federal policy promoting tribal justice systems and practices. These policies affect the tribal exhaustion issue presented by the Petition for Writ of Certiorari in this case.

While the President has not yet signed this bill, we have been informed by the Senate Committee Office on Indian Affairs that the bill is expected to be signed shortly.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, this Court should grant petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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December 2, 1993